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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 543

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED, APPELLANT,

vs.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

FILED MARCH 13, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED, APPELLANT,

vs.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

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IN THE SUPREME COURT OF INDIANA

No. 27881

GILBERT K. HEWIT, Dir. Gross Income Tax Dept. etc.

vs.

GATH P. FREEMAN, Trustee, etc.

Appeal from Wayne Circuit Court

NOTE RE FILING OF TRANSCRIPT—June 17, 1943

Filed June 17, 1943, Thomas C. Williams, Clerk. 1943, June 17, Record, Assignment of Errors, Notices served below. Submitted under Rule 2-14.

[fol. 7] IN THE SUPREME COURT OF INDIANA

[Title omitted]

ASSIGNMENT OF ERROR—Filed June 17, 1943

The appellant says there is manifest error in the Judgment and proceedings in this cause, in the following particular:

1. The trial court erred in overruling appellant's motion for a new trial, which motion contained the following specifications:

"1. The decision of the Court is not sustained by sufficient evidence;

2. The decision of the Court is contrary to law."

Wherefore, the appellant prays that the judgment of the Wayne Circuit Court be reversed.

(Signed) James A. Emmert, The Attorney General; (Signed) David I. Day, Jr., Deputy Attorney General; (Signed) Byron B. Emshwiller, Deputy Attorney General, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 8] [Caption omitted]

IN THE WAYNE CIRCUIT COURT

GATH P. FREEMAN, Trustee under the Will and of the Estate [fol. 9] of Henry C. Starr, Deceased, Plaintiff,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax, Department of Treasury, State of Indiana, Defendant

No. 31071

COMPLAINT TO RECOVER GROSS INCOME TAX IMPROPERLY CHARGED AND COLLECTED, AND INTEREST THEREON—Filed January 27, 1942

Comes now the plaintiff, Gath P. Freeman as Trustee under the will and of the estate of Henry C. Starr, deceased, and complains of the Defendant, Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, of the State of Indiana, and for cause of action alleges and says:

That the Plaintiff, Gath P. Freeman, Trustee aforesaid, was at all times herein mentioned and now is Trustee under the will and of the estate of Henry C. Starr, deceased, late of Wayne County, State of Indiana, and that said Gath P. Freeman was at all times herein mentioned and now is domiciled in and a resident of Wayne Township in Wayne County in the State of Indiana, and that the situs of said trust estate was at all times herein mentioned and now is in said Wayne Township in Wayne County in the State of Indiana, and that all matters and transactions herein alleged or involved or complained of and herein sued upon were matters and transactions of said trust estate and were handled and done and performed by the Plaintiff as such Trustee aforesaid for the use and benefit and as the business of said trust estate, and that the Plaintiff at all times [fol. 10] herein mentioned had and now has full and legal powers and authority in the premises, as such Trustee aforesaid.

That the defendant, Gilbert K. Hewit, Director aforesaid, is Director of Gross Income Tax of the Department of Treasury of the State of Indiana and was duly desig-

nated by the proper official of said State of Indiana as such Director to act as the chief administrative officer charged with the administration and/or enforcement of the Indiana Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto.

That the Plaintiff on the 28th day of January or the 29th day of January, 1941, filed with and in the office of the Gross Income Tax Division of the State of Indiana, as required by law, a Fiduciary Gross Income Tax Return for said trust estate for the period beginning January 1, 1940, and ending December 31, 1940, and paid the total balance of tax indicated thereon in the sum of $760.74. That in and by said Return the Plaintiff reported and returned on line 3 thereof under protest the sum of $65,214.20 constituting and being the amount of gross receipts and total sale prices received by the Plaintiff from the sale of intangible personal property consisting of corporate stocks and bonds of foreign corporations belonging to said trust estate and sold by the Plaintiff in inter-state commerce in the year 1940 to residents of states other than the State of Indiana.

That the sale so made *were* of the following described [fol. 11] property consisting of corporate stocks and the certificates therefor and bonds and for the respective gross sale amounts or gross sale prices set forth and described as follows, to-wit:

50 shares common stock of Allied Chemical & Dye Corporation	$6,897.36
50 shares common stock of American Telephone and Telegraph Company	7,985.83
2265 shares of Corporate Trust Shares Accumulative Modified	4,981.53
100 shares of common stock of Continental Can Company	3,462.88
100 shares of common stock of Continental Can Company	3,552.37
100 shares of common stock of Hollinger Mines, Lts.	585.78
555 shares of North American Trust Shares	1,220.51
200 shares of common stock of National Biscuit Company	3,560.04
200 shares of common stock of National Biscuit Company	3,459.88
277 shares of Quarterly Income Shares, Inc.	1,498.28

100 shares of common stock of Standard Brands, Inc.	521.23
100 shares of common stock of South Porto Rico Sugar Co.	2,048.45
100 shares of common stock of South Porto Rico Sugar Co.	1,876.21
[fol. 12] 100 shares of common stock of F. W. Woolworth Company	3,076.68
200 shares of common stock of F. W. Woolworth Company	5,953.63
$5000 American Furniture Mart Building Bonds 3-6's of 1955	3,784.13
$3000 Buenos Aires Readjustment Bonds, 4⅝ of 1976	1,311.96
$5000 Cairo Bridge and Terminal Co. bonds, 6½'s of 1938	3,934.56
$5000 Commonwealth of Australia 4½% Gold Bonds of 1956	1,768.01
$5000 Western Maryland Railroad Co., 4's of 1952	3,734.88
Total	$65,214.20

That each and all of said sales of said property were made by the Plaintiff through the New York Stock Exchange or in over the counter market in the City of New York in the State of New York to persons who were residents of states other than the State of Indiana, and that upon the sales of said property being effected through such stock exchange or in such over the counter market the Plaintiff herein shipped or mailed by United States mail from the City of Richmond in the State of Indiana the stock certificates and/or the bonds herein above described to the broker representing this Plaintiff in said City of New York for delivery there to the respective purchasers upon the [fol. 13] respective sales so made, and that said stock certificates and said bonds were delivered to such respective purchasers thereof in said State of New York in execution, completion and consummation of the sales so made. That each and all of said sales of said property were transactions in interstate commerce and were and are exempt from the payment of Gross Income Tax to the State of Indiana and that no Gross Income Tax was or is due or payable to the State of Indiana on account of the same by reason of the

fact that all of said transactions constituted and were interstate commerce and the gross receipts of the Plaintiff therefrom were receipts from business conducted in commerce between the State of Indiana and State of New York or other states of the United States, and the Gross Income Tax charged and collected therefor or on account thereof constituted a regulation of and a burden upon commerce between the State of Indiana and other states of the United States in conflict with Article I, Section 8 of the Constitution of the United States, and that the State of Indiana and the defendant herein was and is prohibited from taxing such gross income or receipts under the Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto.

That the Plaintiff made return of said gross income and receipts and paid the Gross Income Tax thereon in the sum of $652.14 on said 28th day of January, 1941, under protest solely to avoid the imposition of penalties and interest thereon, and that the Defendant improperly charged and collected said tax from the Plaintiff, and that the Plaintiff [fol. 14] was and has been improperly required to pay the same.

That at the same time, to-wit: on the 28th day of January 1941, the Plaintiff filed with and in the office of the Gross Income Tax Division of the State of Indiana, as authorized and required by law, a verified petition for refund of said Gross Income Tax so returned and paid and so improperly charged and collected by the Defendant from the Plaintiff, in which there was set forth at length the facts constituting the ground of Plaintiff's protest and objections to the payment of said tax so improperly charged and collected and on which said claim for refund was based and upon which this Plaintiff relies in this action; and that on or about the 28th day of February, 1941, the Defendant notified the Plaintiff in writing that his said verified claim for refund of said tax was disallowed and denied.

That the Defendant has wholly failed and refused to refund to the Plaintiff the said tax so paid under protest and so improperly charged and collected by the Defendant, or any part thereof, and that the Plaintiff has done all things and has taken all steps and action required by law to be done or taken before the filing of this complaint for refund or recovery of said tax, and that there is now justly due the Plaintiff from the defendant the said sum of $652.14 by way

of refund of said tax aforesaid, together with interest thereon allowed by law, and the same is wholly unpaid.

Wherefore, the Plaintiff prays and demands judgment [fol. 15] against the Defendant for said amount of $652.14, together with interest thereon from the date of payment of said tax in said amount, for his costs herein laid out and expended, and for all other proper relief in the premises.

Gath P. Freeman, Attorney for Plaintiff.

Duly sworn to by Gath P. Freeman. Jurat omitted in printing.

[fol. 16] IN THE WAYNE CIRCUIT COURT

SUMMONS—Issued Jan. 27, 1942

STATE OF INDIANA,
Wayne County, ss:

The State of Indiana to the Sheriff of Marion County, Greeting:

You are hereby commanded to summon Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana, (copy of complaint attached hereto) to appear in the Circuit Court of Wayne County, Indiana, before the Judge thereof, on the 24th day of February 1942, at the Court House, in the City of Richmond, to answer the complaint of Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, deceased—Complaint to Recover Gross Income Tax Improperly Charged and Collected and Interest Thereon. Demand $652.14 and Interest, and of this Writ make due return.

Witness my name and the Seal of said Court, at the City of Richmond, this 27th day of January, 1942. Russell Robbins, Clerk. (Seal.)

[fol. 17] IN THE WAYNE CIRCUIT COURT

[Title omitted]

ANSWER—Filed Feb. 21, 1942

Comes now the defendant and for answer to the plaintiff's complaint herein, states;

1. The defendant admits so much of the first literary paragraph of the complaint as alleges that the plaintiff, Gath P. Freeman, Trustee, is and has been a trustee un-
[fol. 18] der the will and of the estate of Henry C. Starr, deceased; that the plaintiff is a resident of and is now domiciled in Wayne County, Indiana; that the situs of the trust estate is Wayne County, Indiana; and that the transactions involved in this action were transactions of said trust estate and were performed by the plaintiff as trustee.

2. The defendant admits all of the allegations of the second literary paragraph of the plaintiff's complaint to-wit:

"That the Defendant, Gilbert K. Hewit, Director aforesaid, is Director of Gross Income Tax of the Department of Treasury of the State of Indiana and was duly designated by the proper official of said State of Indiana as such Director to act as the chief administrative officer charged with the administration and/or enforcement of the Indiana Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto."

3. In answer to the third literary paragraph of plaintiff's complaint, the defendant admits that the plaintiff filed with the Gross Income Tax Division of the State of Indiana a fiduciary return for the calendar year 1940 and that the tax reflected in the amount of $760.74 was paid; the defendant admits that such return reflected a sum of $65,-214.20, but this defendant is without knowledge as to the source of such income; and the defendant denies that such income was received from transactions in interstate commerce.

4. In answer to the fourth literary paragraph of plain-
[fol. 19] tiff's complaint, the defendant states that it is without knowledge of the truth or falsity of the allegations that the sales referred to were of corporate stocks and bonds and were sold for the amounts alleged.

5. The defendant is without knowledge of the truth or falsity of the allegations of the plaintiff in his fifth literary paragraph of complaint that the sales referred to were made in stock markets in New York, New York; that such sale- were made to residents of states other than the State of Indiana; that such stocks and bonds were mailed from Richmond, Indiana, to plaintiff's broker in New York, New York; and that such stocks or bonds were delivered to purchasers in New York, New York. The defendant denies that the sales referred to were sales in interstate commerce; that such sales were exempt from Indiana Gross Income Tax; and that the tax collected by the State of Indiana constituted a regulation and burden upon commerce between the State of Indiana and other states of the United States, in conflict with Article I, Section 8 of the Constitution of the United States.

6. The defendant admits the allegation in literary paragraph six of plaintiff's complaint which alleges that a Gross Income Tax Return was filed by plaintiff for the year 1940; that such return was filed under protest; and that a tax in the amount of $652.14 was paid on an item listed on such return in the amount of $65,214.20, but the defendant is without knowledge of the source of such in-[fol. 20] come to plaintiff; further defendant denies that the tax in the amount of $652.14 was improperly charged and collected from plaintiff by defendant.

7. In answer to literary paragraph seven of plaintiff's complaint, the defendant admits that in January, 1941, plaintiff filed with defendant his verified claim for refund, setting forth plaintiff's protest and objections to the collection of tax on certain items of income for the year 1940; and defendant further admits that defendant notified plaintiff that such claim for refund was denied and disallowed.

8. The defendant admits that the refund claimed by plaintiff has been refused by defendant and that no part of the tax paid by plaintiff to defendant for the year 1940 has been refunded by defendant; the defendant further admits that plaintiff has taken all steps required by law precedent to the bringing of this action; but defendant denies that there is any amount due plaintiff by defendant.

9. The defendant, as a further answer to the plaintiff's complaint, says that as to any allegation or averment, or

any part thereof, contained in the said plaintiff's complaint, not either admitted or denied heretofore in this answer, the defendant now specifically denies each and every and all such allegations and averments or parts thereof.

Wherefore, defendant prays that judgment be rendered in its behalf for defendant's costs, and for all other proper relief in the premises.

[fol. 21] George N. Beamer, The Attorney General;
Joseph P. McNamara, Deputy Attorney General;
Byron B. Emswiller, Deputy Attorney General.

IN THE WAYNE CIRCUIT COURT

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Feb. 18, 1943

Come parties, in person and by counsel, and this cause being at issue is submitted to the Court for trial and determination without the intervention of a jury.

Opening statements by counsel, and evidence introduced [fol. 22] by plaintiff and defendant.

And now this cause is now submitted to the Court for finding and judgment, and the plaintiff submits briefs by way of argument, and now this cause is taken under advisement by the Court and defendant is granted twenty days to file its brief herein.

IN THE WAYNE CIRCUIT COURT

GATH P. FREEMAN, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Plaintiff,

v.

GILBERT K. HEWIT, Director of Gross Income Tax, Department of Treasury, State of Indiana, Defendant.

FINDING AND JUDGMENT—March 26, 1943

The Court having examined and read the briefs filed by counsel herein, and having considered the evidence introduced at the trial of this cause and being duly advised in the premises now finds for the plaintiff and against the defendant, and that the allegations of plaintiff's complaint

are true and that the prayer of the complaint should be granted and plaintiff should recover from the defendant the [fol. 23] sum of $652.14 with interest thereon from date of payment of tax, to-wit: January 29th, 1941 and costs herein.

It is therefore considered, adjudged and ordered by the Court that the plaintiff have and recover from the defendant the sum of Six Hundred and Fifty two ($652.14) Dollars and fourteen cents with interest thereon from January 29th, 1941 and costs of this action.

[fol. 24] IN THE WAYNE CIRCUIT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed April 8, 1943

Comes now Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana and moves the Court for a new trial and for grounds therefore states:

1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law.

James A. Emmert, The Attorney General; David I. Day, Jr., Deputy Attorney General; Byron B. Emswiller, Deputy Attorney General, Attorneys for defendants.

IN THE WAYNE CIRCUIT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.—April 8, 1943

The Court having inspected the motion for a new trial [fol. 25] and being duly advised in the premises now overrules the same, and defendant excepts.

Come now the parties in the above entitled cause and the defendant having filed his motion for a new trial on the 8th day of April, 1943, and the same having been overruled on the 8th day of April, 1943, and the defendant having duly excepted at the time, the defendant now prays an appeal to the Supreme Court of Indiana, which prayer is now granted.

Said defendant requests sixty (60) days within which to file all bills of exceptions, and the request is now granted.

Comes now the defendant in the above-entitled cause, and within the time allowed by the Court, presents Bill of Exceptions No. 1, and the same is now signed, sealed and certified by the Judge to be correct and to contain all of the evidence given in this cause, and the same is now ordered to be filed by the Clerk and made a part of the Record, without copying, and the same is now filed by the Clerk and made a part of the Record.

[File endorsements omitted]

IN THE WAYNE CIRCUIT COURT

[Title omitted]

[fol. 26] Before the Honorable Gustave H. Hoelscher, Sole Judge of Said Court

Defendant's Bill of Exceptions Containing All of the Evidence Given in Said Cause—Filed April 8, 1943

Be It Remembered: That heretofore and upon, to-wit, the 18th day of February, 1943, the same being a Judicial Day of the January Term, 1943, of said Court, the above-entitled cause came on for trial before the Honorable Gustave H. Hoelscher, sole judge of the Seventeenth Judicial Circuit Court of Indiana, without the intervention of a jury.

That, at the trial of said cause and before the introduction of any evidence therein, the Court ordered John F. Holaday, the duly appointed and sworn Official Court Reporter of said Court, to take down and note in shorthand all of the evidence given in said cause, including both questions and answers, and to take down and note all rulings of the [fol. 27] judge in respect to the admission and rejection of evidence, and the objections and exceptions of counsel thereto.

That thereupon the said John F. Holaday, Official Court Reporter of said Court, did take down and note, in shorthand, all of the evidence given in said cause, including both questions and answers, and did take down and note all rulings of the judge in respect to the admission and rejection

of evidence, and the objections and exceptions of counsel thereto, under the direction of the judge of said Court, which evidence, rulings of the judge, and objections and exceptions, as aforesaid, so taken down and noted in shorthand by said Official Court Reporter of said Court, together with all documentary evidence and exhibits admitted in evidence, were, by him, afterward, at the request of the defendant, written out in typewritten manuscript, which evidence, including both questions and answers, and rulings of the judge in respect to the admission and rejection of evidence and the objections and exceptions of counsel thereto, together with all documentary evidence, and true copies of all exhibits introduced in evidence, is in the words and figures as follows, to-wit:

[fols. 28-29] APPEARANCES:

Gath P. Freeman, Esq., Richmond, Indiana, for the plaintiff;

Byron B. Emswiller, Esq., Deputy Attorney General of the State of Indiana, Indianapolis, Indiana, for the defendant.

The plaintiff, to support and maintain the allegations of his complaint herein, gave, offered and introduced the following evidence:

Byron B. Emswiller, was called to testify as a witness in behalf of the plaintiff, and, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows on direct examination, on being questioned by Mr. Freeman, attorney for the plaintiff:

[fol. 30] Q. You may state your name to the Court.

A. Byron B. Emswiller.

Q. Have you a position with The State of Indiana?

A. I have.

Q. What is it?

A. I am an attorney for the Gross Income Tax Division.

Q. Are you classed as a deputy Attorney General of The State of Indiana?

A. No, sir.

Q. I thought you were.

A. I was until January 13th.

Q. You are now attorney of record in the trial of this action now before the Court?

A. That is right.

Q. Representing the defendant in this action?

A. Yes, sir.

Q. Are you familiar with the files of this case, and what transpired prior to the filing of the case, so far as shown by letters or correspondence?

A. I am.

Q. Do you have in your possession a letter written by me, signed by me, dated February 19, 1941, in connection with the tax liability of Henry C. Starr Estate, of which I am trustee, addressed to Gross Income Tax Division, Mr. Gilbert K. Hewit, Director, Mr. R. M. Worrell, Audit Section—Estates, 141 South Meridian Street, Indianapolis, Indiana?

[fol. 31] A. I have that letter.

The witness produced a letter and the same is, by request of counsel for the plaintiff, marked by the Official Court Reporter as "Exhibit 1."

Q. I will hand you this letter, which has just been marked "Exhibit 1" by the Court Reporter, and ask you to state whether that is the letter you have just referred to by your last answer.

A. That is the letter, yes, sir.

Q. It appears to be file-marked, with red ink stamp, on the face of that letter. Do you know whose stamp that is?

A. That is the stamp of the Gross Income Tax Division.

Q. Of the State of Indiana?

A. That is right.

Q. You may state whether that letter, marked "Exhibit 1," was received by the addressee, The Gross Income Tax Division, Mr. Gilbert K. Hewit, Director.

A. It was received, yes, sir.

Q. Would you know about when it was received?

A. February 21, 1941.

[fol. 32] Mr. Freeman: The plaintiff offers in evidence the letter which has been marked "Exhibit 1."

Exhibit 1 was admitted in evidence, was read to the Court, and is in words and figures as follows, to-wit:

EXHIBIT 1

Stamped: Received Feb. 21, 1941, Gross Income Tax Store License Div.

GATH P. FREEMAN

Lawyer

Richmond, Indiana

Leland Hotel

February 19, 1941.

Gross Income Tax Division, Mr. Gilbert K. Hewit, Director.
Mr. R. M. Worrell, Audit Section—Estates, 141 South Meridian Street, Indianapolis, Indiana.

GENTLEMEN:

Re: Henry C. Starr Estate, Gath P. Freeman, Trustee

Replying to your letter of the 18th I beg to advise that I am Trustee under the will of Henry C. Starr, deceased, who died in 1923, and that the trust created by the will is a private trust requiring no report to the Court. Therefore, [fol. 33] there are no Court reports reflecting income requested by your letter.

I handle the trust estate as Trustee under the will, collect the income, pay the expenses and make distribution to the three beneficiaries, without reports to or orders of Court.

I understood that the Department had always taken the position that receipts from the sales of intangibles in interstate transactions are subject to the Gross Income Tax. In 1939 I paid tax on receipts from sales of intangibles in interstate commerce, the amount being comparatively small, although it was my opinion that the same was not liable for the tax. However, I have three years from January, 1940, in which to claim refund therefor, as I read the law.

Inasmuch as the tax liability was large for the year 1940, according to the construction of the law by the Department, I decided to claim refund of tax paid on such interstate commerce transactions immediately upon filing the return and paying the tax. In doing so I was actuated in part by the fact that a suit was filed in the Federal Court at Indianapolis last September to test the question of validity of the Gross

Income Tax claimed by the Department on receipts from sales of intangibles in interstate commerce. I understand that this is the first suit raising this issue. However, my tax liability, if any, as such Trustee for the year 1940 on [fol. 34] interstate sales of intangibles is of sufficient magnitude to warrant the testing of the question on account of the estate which I represent as such trustee.

Respectfully, Gath P. Freeman.

GPF: mk.

Counsel produces a letter dated February 28, 1941, purporting to be signed by J. M. Simmons Audit Section—Estates, which is marked, at his request, by the Official Court Reporter as "Exhibit 2."

Q. I hand you what purports to be another letter, which is marked "Exhibit Number 2," bearing date February 28, 1941, addressed to Gath P. Freeman, Lawyer, Leland Hotel, Richmond, Indiana, in connection with the estate of Henry C. Starr, deceased, Gath P. Freeman, Trustee, purporting to be signed by Gilbert K. Hewit, Director Gross Income Tax Division, by J. M. Simmons. I will ask you to state whether that is Mr. Simmons's signature.

A. Yes. That is Mr. Simmons's signature.

Q. Is that a letter that Mr. Gilbert K. Hewit, Director Gross Income Tax Division signed?

A. It was written over his signature, yes, sir.

[fol. 35] Q. Would you say then, it is Mr. Gilbert K. Hewit's letter?

A. No, sir. I wouldn't say it was Mr. Hewit's letter. I would say it was a letter written by one of his employes.

Q. Or one of his assistants?

A. Yes, sir.

Q. Mr. Simmons being an employe of Mr. Hewit, or being an assistant to Mr. Hewit, both employes of The State of Indiana.

A. I think you are right, that he would be an assistant. He and Mr. Hewit are both employes of The State of Indiana.

Q. Do you know whether Mr. Simmons was then authorized to act for Mr. Hewit in the signing of that letter or of similar letters?

A. Yes, sir. He was.

Mr. Freeman: That is all.

Whereupon the witness was excused.

[fol. 36] Mr. Freeman: The plaintiff now offers in evidence Exhibit 2.

The Court: If there is no objection, show the same admitted.

Exhibit 2 was admitted in evidence, was read to the Court, and is in words and figures as follows, to-wit:

EXHIBIT 2

State of Indiana

Gross Income Tax and Store License Division

Department of Treasury

141 South Meridian Street

Indianapolis, Indiana

February 28, 1941

Gilbert K. Hewit, Director.

Board: Henry F. Schricker, Governor; James M. Givens, Treasurer; Richard T. James, Auditor.

Gath P. Freeman, Lawyer, Leland Hotel, Richmond, Indiana.

DEAR SIR:

Re: Est. of Henry C. Starr, Dec.
Gath P. Freeman, Trustee

This will acknowledge receipt of your letter of February 19.

[fol. 37] This Department has always taken the position that the income from the sale of intangibles is not subject to regulations concerning sales made in interstate commerce and that only tangible property will be subject to these provisions.

May we refer you to the case of the Department of Treasury vs. J. D. Adams & Company.

Trusting this is the desired information, I am,

Very truly yours, Gilbert K. Hewit, Director, Gross Income Tax Division, by J. M. Simmons, Audit Section—Estates."

jsm/mo.

Mr. Freeman: If the Court please, we have a statement of facts in this case, signed by both parties.

Counsel produces a written statement of facts which is, at his request, marked by the Official Court Reporter as "Exhibit 3."

Mr. Freeman: The parties have an agreed statement of facts, which has been marked "Exhibit 3," which I now offer in evidence.

The Court: If there is no objection, the same may be [fol. 38] shown admitted in evidence.

Exhibit 3 was admitted in evidence, read to the Court, and is in words and figures as follows, to-wit:

[Title omitted]

[fol. 39]

EXHIBIT 3

STIPULATION OF FACTS—Filed April 8, 1943

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the facts hereinafter set forth shall be considered as facts proved under the issues in this cause, with the same force and effect as though established by competent evidence introduced at the trial, namely:

1. The plaintiff, Gath P. Freeman, is and was at all times mentioned herein, the trustee under the Will and of the Estate of Henry C. Starr, deceased, late of Wayne County, State of Indiana, and Gath P. Freeman was at all times herein mentioned and now is domiciled in and a resident of Wayne Township in Wayne County, State of Indiana, and all matters and transactions herein involved were matters and transactions of said trust estate and were handled and performed by the said trustee for the use and benefit [fol. 40] and as the business of the trust estate, and that Gath P. Freeman at all times herein mentioned had and now has full and legal power and authority to act as such trustee. Further, that neither Gath P. Freeman, nor the Estate of Henry C. Starr, nor Gath P. Freeman, as trustee, had or has a place of business at any point other than at Richmond, Wayne County in the State of Indiana. That the plaintiff is hereinafter referred to as the trustee.

2. The defendant, Gilbert K. Hewit, is the Director of the Gross Income Tax Division, Department of Treasury of the State of Indiana, and was duly designated by the Governor of said State of Indiana as such Director, and as the Chief Administrative officer charged with the administration and enforcement of the Indiana Gross Income Tax Act of 1933, and the acts amendatory thereof and supplemental thereto.

3. In January, 1941, the trustee filed a fiduciary gross income tax return for the trust estate mentioned above for the period beginning January 1, 1940, and ending December 31, 1940, and paid the total amount of tax reflected on such return. In said return the trustee included as taxable income an item of $65,214.20, constituting the gross receipts received by the trustee from the sale of intangible personal property consisting of corporate stocks and bonds of foreign corporations belonging to the said trust estate. The trustee paid gross income tax on such receipts in the [fol. 41] amount of $652.14, under protest.

4. The sales made by the trustee were of the following described property consisting of corporate stocks and bonds and are set forth and described as follows, to-wit:

50 shares common stock of Allied Chemical & Dye Corporation	$ 6,897.36
50 shares Common stock of American Telephone & Telegraph Company	7,985.83
2,265 shares of Corporate Trust Shares accumulative Modified	4,981.53
100 shares of common stock of Continental Can Co.	3,462.88
100 shares of Common stock of Continental Can Co.	3,552.37
100 shares of common stock of Hollinger Mines, Ltd.	585.78
555 shares of North American Trust shares	1,220.51
200 shares of common stock of National Biscuit Co.	3,560.04
200 shares of common stock of National Biscuit Co.	3,459.88
277 shares of Quarterly Income Shares, Inc.	1,498.28
100 shares of common stock of Standard Brands, Inc.	521.23

100 shares of common stock of South Porto Rico Sugar Company	2,048.45
100 shares of common stock of South Porto [fol. 42] Rico Sugar Company	1,876.21
100 shares of common stock of F. W. Woolworth Co.	3,076.68
200 shares of common stock of F. W. Woolworth Co.	5,953.63
$5,000 American Furniture Mart Building Bonds 3-6's of 1955	3,784.13
$3,000 Buenos Aires Readjustment Bonds, 4⅝ of 1976	1,311.96
$5,000 Cairo Bridge & Terminal Co. Bonds, 6½'s of 1938	3,934.56
$5,000 Commonwealth of Australia 4½ Gold Bonds of 1956	1,768.01
$5,000 Western Maryland Railroad Co., 4's of 1952	3,734.88
Total	$65,214.20

5. The sales of the above described corporate stocks and bonds were twenty separate sales made from time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service [fol. 43] over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished

the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner [fol. 44] and Beane offered the stocks or bonds according to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana, over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana, the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown

[fol. 45] nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as a broker to procure sales thereof on or for commissions. All of said sales were handled in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana.

6. Subsequent to the payment of tax in controversy in [fol. 46] the amount of $652.14, the plaintiff filed a claim for refund for such amount with the defendant. The defendant denied in full such claim for refund.

7. All steps necessarily precedent to the institution of this action, have been taken by plaintiff and defendant.

8. Either party to this suit may introduce additional evidence at the time of the trial of this cause.

Gath P. Freeman, Attorney for Plaintiff. George N. Beamer, David I. Day, Jr., Byron B. Emswiller, Attorneys for Defendants."

[File endorsement omitted.]

[fol. 47] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 48] IN THE WAYNE CIRCUIT COURT

ORDER APPROVING BILL OF EXCEPTIONS—April 8, 1943

STATE OF INDIANA,
County of Wayne, ss:

I, Gustave H. Hoelscher, sole judge of the Wayne Circuit Court, which County of Wayne comprises the 17th Judicial Circuit of the State of Indiana, do hereby certify that the above and foregoing Bill of Exceptions contains all of the evidence given upon the trial of the above-entitled and numbered cause, of Gath P. Freeman, Trustee under the will and of the estate of Henry C. Starr, deceased, against Gilbert K. Hewit, Director of State Income Tax, Department of Treasury, State of Indiana, together with all objections of counsel, rulings of the Court thereon, and exceptions reserved to such rulings, taken upon the trial of said cause.

I further certify that on the 8th day of April, 1943, the defendant presented said Bill of Exceptions to me for my approval; and, having examined said Bill, I now approve and sign and seal the same and make it a part of the record in said cause.

In Witness Whereof, I have hereunto set my hand and the Seal of the Wayne Circuit Court, at the court house in the City of Richmond, Indiana, on this 8th day of April, 1943.

(Signed) Gustave H. Hoelscher, Judge, Wayne Circuit Court.

[fol. 49] IN THE WAYNE CIRCUIT COURT

[Title omitted]

PRAECIPE FOR RECORD—Filed April 8, 1943.

To the Clerk of the Wayne Circuit Court:

You are hereby requested by the defendant in the above entitled cause to prepare and properly certify for use on appeal to the Supreme Court of Indiana, a transcript of the entire record in the above entitled cause, said transcript to include all papers and records, orders, rulings, exceptions and proceedings made, taken, filed, and had in the [fol. 50] above entitled cause, including, but not in limitation thereof, the following:

First, the summons, complaint and answer. Second, the finding, judgment and decree of the Court. Third,

the defendant's "Motion for a New Trial" and the ruling thereon. Fourth, the defendant's prayer for an appeal and the ruling thereon. Fifth, incorporating therein the transcript of the evidence. Sixth, all pleadings, papers, orders, rulings and exceptions made and taken in said cause and the judgment rendered thereon. Seventh, this Praecipe and all other proper papers, records, orders, rulings and exceptions.

Gilbert K. Hewit, Director of Gross Income Tax; Department of Treasury, State of Indiana. James A. Emmert, the Attorney General. David I. Day, Jr., Deputy Attorney General. Byron B. Emswiller, Deputy Attorney General.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] IN THE WAYNE CIRCUIT COURT

[Title omitted]

NOTICE TO CLERK—Filed April 8, 1943

To the Clerk of the Wayne Circuit Court:

You are hereby notified that the defendant in the above entitled cause will appeal to the Supreme Court of Indiana from the judgment rendered against the said defendant by the Wayne Circuit Court in the above entitled cause on 26th day of March, 1943.

Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana. (Signed) James A. Emmert, the Attorney General. [fol. 53] David I. Day, Jr., Deputy Attorney General. Byron B. Emswiller, Deputy Attorney General, Attorneys for Defendant.

Receipt of the foregoing notice is hereby acknowledge by me this 8th day of April, 1943.

(Signed) Kendal E. Mathews, Clerk of the Wayne Circuit Court.

[File endorsement omitted.]

[fol. 54] IN THE WAYNE CIRCUIT COURT

[Title omitted]

NOTICE TO PLAINTIFF

To Gath P. Freeman, Attorney for Plaintiff, Richmond, Indiana. Gath P. Freeman, Trustee, under the Will and of the Estate of Henry C. Starr, deceased:

You are hereby notified that the defendant in the above entitled cause will appeal to the Supreme Court of Indiana from the judgment rendered against the said defendant by the Wayne Circuit Court in the above entitled cause on March 26, 1943.

Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana. [fols. 55-56] (Signed) James A. Emmert, the Attorney General. David I. Day, Jr., Deputy Attorney General. Byron B. Emswiller, Deputy Attorney General. Attorneys for Defendant.

Receipt of the foregoing notice is hereby acknowledged by me this 10th day of April, 1943.

(Signed) Gath P. Freeman, Attorney for Plaintiff.

[fol. 57] IN SUPREME COURT OF INDIANA

* * * * * * * *

EXCERPTS FROM APPELLANT'S BRIEF—Filed July 1, 1943

"Page 2

II

"What the Issues Were

"The issues were formed by the filing of an Answer in Denial (Record, p. 10, l.16, to Record, p. 14, l.15) to plaintiff's Complaint (Record p. 2, l.24, to Record p. 8, l.30). The contentions of the parties were briefly as follows:

"The appellee contended that the amounts received by him and covered by the evidence constituted gross income derived from business conducted in commerce between the

State of Indiana and other States of the United States to such an extent that the State of Indiana is prohibited from taxing such income by Section 8, Article I of the Constitution of the United States of America.

"The appellant contended that the transactions reflected by the evidence did not constitute that type of commerce which the State of Indiana is prohibited from taxing under the provisions of the Commerce Clause of the Federal Constitution."

(and also

"Page 23.

"Propositions, Points and Authorities.

"I

[fol. 57a]

"Indiana, Being the Domicile of the Seller is Privileged to Tax

"This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

"'1. The trial court erred in overruling appellant's Motion for a New Trial, which motion contained the following specifications:

"1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law' ". Record, p. 1.

"Point 1

"The taxpayer is domiciled within Indiana and therefore Indiana has the power, and does impose an income tax upon him regardless of the source of the income."

"Record p. 31:
Sec. 2, Chap. 117, Acts of 1937:
[fol. 58] Maguire v. Trefry (1919), 253 U. S. 12;
Lawrence v. State Tax Commission (1931), 286 U. S. 276;
Sec. 1(m), Chap. 117, Acts of 1937.

"Point 2

"The tax in question is an excise levied upon those domiciled within the state and is not an intangibles tax, or a tax

on the certificates or evidences of indebtedness. Appellee is domiciled here.

Miles v. Department of Treasury (1935), 209 Ind. 172, 199 N. E. 372.

"Point 3

"Stock certificates and bonds are documents which are evidences of the number of shares of stock which the holder of them owns or the amount of money due a lender and do not in themselves constitute choses of action or property.

Edwards v. Wabash Ry. Co. (1920), 264 F. 610, 613.

"Point 4

"The burden of establishing a right to a claimed exemption is upon the one who claims it.

Orr v. Baker (1853), 4 Ind. 86;

2 Cooley on Taxation (4th Ed.) (1924), Sec. 672, p. 1407;

Henderson Bridge Co. v. Henderson (1899), 173 U. S. 592.

"Proposition II

"The Rule of Mobilia Sequuntur Personam is Applicable Here

[fol. 59] "This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

"'1. The trial court erred in overruling appellant's motion for a New Trial, which motion contained the following specifications:

1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law.'"

Record, p. 1.

"Point 1

"The rule of "mobilia sequuntur personam" merely means that the situs of personal property for purposes of taxation is the domicile of the owner unless there is a statute to the contrary or—in case of intangible property, it has acquired a business situs in a state other than the one where

the owner is domiciled. Neither appellee nor the intangibles involved here acquired any situs outside Indiana.

Cooley, Taxation (4th Ed.), sec. 440.

"Point 2

"The Supreme Court has said:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard [fol. 60] to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not."

Blodgett, Tax Comm. of State of Connecticut v. Silberman, et al. (1928), 277 U. S. 1.

"During all of appellee's transactions, therefore, the situs of his stocks and bonds was in Indiana."

"Point 3

"And that Court has also said:

"Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicile of the creditor and within the jurisdiction of the state where he has such domocile. It is property within that state. Thus it has been held that a debt owed by a citizen of one state against a citizen of another state and evidenced by the bond of the debtor secured by a deed of trust or mortgage upon real estate situated in the state where the debtor resides, is property taxed by the state of the residence of the creditor, if the statute of that state so provides, and such tax violates no provision of the Federal Constitution.

Kirtland v. Hotchkiss, 100 U. S. 491."

Buck v. Beach (1906), 206 U. S. 392."

"Point 4

[fol. 61] "In this class of cases the tendency of modern authorities is to apply the maxim 'mobilia sequuntur personam' and to hold that the property may be taxed at the domicile of the owner as the real situs of the debt. Obviously, if the property itself can be taxed receipts from the sale thereof may be taxed by the state in which it is located.

Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194."

"Point 5

"Intangible property is so associated with the person of its owner at his domicile that the taxing jurisdiction of his domicile always has the right and power to tax.

Curry, State Tax Comm. of Alabama, et al. v McCanless, Comm. of Finance and Taxation of Tennessee (1939), 307 U. S. 357;

Graves et al. v. Eliott et al. (1939), 307 U. S. 383;

See also: Guaranty Trust Co. v. Virginia (1938), 305 U. S. 19;

New York ex rel Cohn v. Graves (1937), 300 U. S. 308."

"Proposition III

"The Prohibition of the Commerce Clause on Taxing Income from Tangible Property Does Not Apply to the Tax on Income When Intangibles Are Involved.

"This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

[fol. 62] "'1. The trial court erred in overruling appellant's Motion for a New Trial, which motion contained the following specifications:

"1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law.'" Record, p. 1."

"Point 1

"The vice of a tax measured by gross receipts (such as the Indiana Gross Income Tax) on tangible property

levied by the jurisdiction from which the goods are shipped is that there is a possibility that the same type tax could be levied by other jurisdictions and thus tangible merchandise in interstate commerce might be subjected to a multiple tax burden not borne by local commerce.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307."

"Point 2

"The Supreme Court of the United States has very recently held that a tax on gross receipts from tangible property can be levied constitutionally by the buyer's state because by this method interstate commerce thus could pay no more tax than local commerce.

Allied Mills, Inc. v. Department of Treasury (1943), 63 S. Ct. 666, Affirming ——Ind. ——, 42 N. E. (2d) 34:

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33;

[fol. 63] Sears, Roebuck and Co. v. McGoldrick (1938), 18 N. E. (2d) 25."

"Point 3

"Intangible property can be the subject or measure of a tax in as many jurisdictions as give privileges or benefits to the owner of the intangible property. Appellee being domiciled in Indiana, the imposition of this tax is valid, there being no constitutional objection thereto.

State Tax. Comm. of Utah v. Aldrich et al. (1942), 316 U. S. 174;

Curry, State Tax Commissioner of Alabama, et al. v. McCanless, Commissioner of Finance and Taxation of Tennessee (1939), 307 U. S. 357;

Graves et al. v. Eliott, et al., 307 U. S. 283 (1939);

O'Kane v. State (1940), 28 N. E. (2d) 905."

. . . . . .

(page 37 and 38 of Appellant's Brief, as follows:)

. . . . . .

"No constitutional objection can be successfully made against the taxation of the resident trustee involved here, measured by the gross receipts from his sales of intangibles —his sales of rights, the legal situs of which follow his per-

son like the re-idence of an infant child follows that of his parents. An intangible right is incapable of shipment in interstate commerce, therefore the *Adams* case and other cases of the same type involving shipments of corporeal objects in the channels of interstate trade can have no practical application here."

[fol. 64] IN SUPREME COURT OF INDIANA

MINUTE ENTRIES OF FILING APPELLEE'S BRIEF AND APPELLANT'S REPLY BRIEF

And Afterwards, to-wit: On the 29th day of September, 1943, the same being a judicial day of the May Term of the Supreme Court, the following proceedings were had, to-wit:

Comes now the appellee by counsel and files herein his brief (9) and proof of service upon counsel, which brief is in the words and figures following, to-wit: (H. I.).

[fol. 65] And Afterward to-wit: On the 14th day of October, 1943, the same being a judicial day of the May Term of the Supreme Court, the following proceedings were had, to-wit:

Comes now the appellant by counsel and files herein a Reply Brief, (9) together with affidavit of mailing, which brief is in the words and figures following, to-wit: (H. I.)

[fol. 66] IN THE SUPREME COURT OF INDIANA

No. 27881

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, Appellant,

vs.

GATH P. FREEMAN, Trustee under the will and of the Estate of Henry C. Starr, Deceased, Appellee

Appeal from Wayne Circuit Court

OPINION—Oct. 25, 1943

Comes now the parties by counsel and the court, being advised in the premises, reverses the judgment of the court below with the following opinion pronounced by Shake, J.

During 1940 the appellee, who was domiciled in Indiana, paid, under protest, Indiana Gross Income taxes calculated on proceeds derived from the sale of corporate stocks and bonds of foreign corporations. Subsequently, the appellee brought this action and recovered the amount of taxes so paid. The State has appealed from the overruling of its motion for a new trial, which asserted that the decision was contrary to law.

The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation:

"5. The sales of the above described corporate stocks [fol. 67] and bonds were twenty separate sales made from time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to [fol. 68] said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not

a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds according to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana, the stock certificates or bonds so sold, who mailed the [fol. 69] same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States Mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the

certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest [fol. 70] in any of said sales or property except as a broker to procure sales thereof on or for commissions. All of said sales were handled in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana."

The question presented by this appeal is whether the appellee is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933. § 64-2601 et seq., Burns' 1933, § 15981 et seq., Baldwin's 1934. Section 6 of that act exempts "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the [fol. 71] United Staees."

Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather

a protection against such commerce being subjected to the onerous burdens of multiple exactions. "The validity of State regulation under the commerce clause is to be determined by the balancing of two considerations: that State government shall be able to derive revenue for its support, and that commerce among the States shall be unfettered by provincial impediments. Stated conversely, interstate commerce must bear its share of the tax burden along with intrastate commerce, but the states may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay.

O'Kane v. *State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905.

Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By [fol. 72] adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected.

Dept. of the Treasury v. *Allied Mills, Inc.* (1942), —Ind.—, 42 N. E. (2d) 34.

affirmed by the United States Supreme Court February 15, 1943, —U. S., 87 L. Ed. —, 63 Sup. Ct. 666.

J. D. Adams Mfg. Co. v. *Storen* (1938), 58 Sup. Ct. 913, 304 U. S. 307.

The situs of intangible property, such as stocks and bonds, is not of a transitory character. As to assets of this type there has been applied the rule of "mobilia sequuntur personam"—the situs of the property is the domicile of the owner. This doctrine maintains, generally, in the absence of a statute or of peculiar facts forcing a different conclusion. Cooley, Taxation (4th Ed.) §440.

Union Refrigerator Transit Co. v. *Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36.

Buck v. *Beach* (1906), 206 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732.

Blodgett, Tax Commissioner of the State of Conn. v. *Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410.

Croop v. Walton (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386.

[fol. 73] No such statute has been called to our attention and no such facts are disclosed by the stipulation. It must, therefore, be concluded that the situs of the stocks and bonds sold by the appellee was in this state, where he was domiciled. For a discussion of the circumstances that may establish for intangible property a situs different from the domicile of the owner see

Miami Coal Co. v. *Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333.

The appellee concedes that the law is as stated above, but he relies upon the proposition that the sale of said securities, in the manner described by the stipulation, constituted transactions in interstate commerce. He leans upon the circumstances that the offers of sale, the acceptance of the offers, the delivery of the certificates evidencing ownership, and the remittance of the proceeds by the broker in New York to him in Richmond, Indiana, were effectuated by the facilities of interstate commerce. Having admitted the major premise, the appellee's contention must fail. If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers. The activities of the appellee's agents in making the sales did not change the situs of his securities any more than they affected his domicile. That said activities incidently involved interstate commerce is immaterial.

Holland Furnace Co. v. Dept. of Treasury (1943), [fol. 74] —C. C. A.—, 133 F. (2d) 212.

The stipulated facts disclose a sufficient basis for imposing upon the appellee a tax measured by the gross income derived from the sales therein described. Whether the appellee's incidental activities in another jurisdiction might subject him to additional tax liabilities there is not before us; but even that contingency would not relieve him from the obligation he now seeks to avoid.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162.

O'Kane v. *State*, supra.

The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant.

[fol. 74a] [File endorsement omitted]

[fol. 75] IN SUPREME COURT OF INDIANA

[Title omitted]

APPELLEE'S PETITION FOR REHEARING—Filed Nov. 13, 1943

Gath P. Freeman, Trustee under the will and of the estate of Henry C. Starr, deceased, Appellee in the above-entitled cause, respectfully petitions the Court to grant a rehearing in said cause for the reason that the Court erred in its opinion, decision and judgment rendered October 25, 1943, in the following respects, to-wit:

1. The Court erred in holding that the Gross Income Tax Act of 1933 applies to and validly levies a tax upon the gross income or receipts of Appellee derived from [fol. 76] business conducted in commerce between the State of Indiana and other states of the United States, or between the Appellee, a resident of Indiana, and residents of other states of the United States, since and inasmuch as said Act (a) by the clear wording of its provisions was not intended to apply to gross income or receipts from such commerce, and (b) if so applied and construed would contravene and be repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States, and would be an undue burden on interstate commerce in contravention of said constitutional provisions.

2. The Court erred in holding that the Gross Income Tax Act of 1933 is not repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States, as applied to gross income or receipts of Appellee derived from commerce among the several states of the United States, or between the Appellee, a resident of Indiana, and residents of other states of the United States, and that said Act is valid and applicable to the gross income or receipts of Appellee derived from such commerce.

3. The Court erred in holding that the need of a local or state government for revenue for its support is to be considered in determining the validity of a state tax which directly burdens interstate commerce.

4. The Court erred in holding that interstate commerce [fol. 77] must bear a share of state tax burden even though

the state tax directly burdens interstate commerce in violation of Article I, Section 8, or is violative of Article I, Section 10, of the Constitution of the United States.

5. The Court erred in holding that the intangibles, the corporate stocks and bonds, of the Appellee sold and delivered by him as alleged and described in his complaint in said cause and as proved by the evidence in said cause, were not subjects of commerce, and that the Appellee's sales thereof to residents of other states of the United States did not constitute commerce between or among the several states of the United States within the meaning of Article I, Section 8 of the Constitution of the United States.

6. The Court erred in holding that the sales made by the Appellee were not sales in interstate commerce because or for the reason, as the Court held, that the situs of the securities sold was at the place of Appellee's domicile in Indiana until the ownership passed to the purchasers in New York.

7. The Court erred in holding that the activities of Appellee's agents or brokers in making the sales were not the activities of the Appellee as principal, and that such activities did not change the situs of the securities so sold, the stipulated facts showing that the securities sold were de-
[fol. 78] livered in New York according to the intention of the Appellee and the purchasers and according to the rules of the New York Stock Exchange, upon payment of the purchase price, when and where the situs changed by virtue of such activities from the Appellee's domicile in Indiana to the respective places of domicile of the purchasers in other states of the United States.

8. The Court erred in failing to hold that the stipulated facts in evidence disclosed and proved sales by Appellee of his stocks and bonds from Richmond, Indiana, through the New York Stock Exchange to purchasers resident of other states of the United States; the deliveries of which under the rules of said New York Stock Exchange and according to the intention and acts of the Appellee and the purchasers were in New York, where the titles of the securities passed and the situs changed upon such deliveries from the Appellee in Indiana to the purchasers in other states, and that all such sales were sales in interstate commerce

and that the Gross Income Tax Act of Indiana was not applicable to any of such sales.

9. The Court erred in holding that the stipulated facts failed to disclose and prove that the sales of securities by Appellee were sales in interstate commerce not subject to the tax imposed by the Gross Income Tax Act of Indiana.

10. The Court erred in failing to hold that the stipulated [fol. 79] facts disclosed and proved that the sales of securities by Appellee were sales in interstate commerce protected by the commerce clause of the Constitution of the United States and not subject to or liable for the tax imposed by the Gross Income Tax Act of Indiana.

11. The Court erred in holding that the stipulated facts disclosed a sufficient basis for imposing upon the Appellee a tax measured by the gross income derived from the sales therein described, the stipulated facts showing and disclosing that the sales were transactions in interstate commerce, the receipts or gross income of which, realized or received as the sales prices, were not subject to the provisions of the Gross Income Tax Act of Indiana, the imposition and collection of which tax contravened and was repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States, and was an undue burden on interstate commerce in contravention of said constitutional provisions.

Respectfully submitted, (Signed) Gath P. Freeman, Attorney for Appellee.

[fol. 80] [File endorsement omitted]

[fol. 81] In the Supreme Court of Indiana

[Title omitted]

Proof or Service of Copies of Appellee's Petition for Rehearing and Brief Thereon

Receipt is hereby acknowledged this 13th day of November, 1943, of two printed copies of Appellee's Petition for Rehearing and Brief Thereon in the above entitled cause; also separate copy of Petition for Rehearing.

(Signed) James A. Emmert, The Attorney General of Indiana.

[fol. 82] [File endorsement omitted]

[fol. 83] IN SUPREME COURT OF INDIANA

PETITION FOR ORAL ARGUMENT ON PETITION FOR REHEARING—November 13, 1943

Comes now the appellee by counsel and files his petition for oral argument on petition for rehearing, which petition is in the words and figures following, to-wit: (H. I.).

IN SUPREME COURT OF INDIANA

. . . . . .

ORDER DENYING PETITIONS FOR ORAL ARGUMENT AND REHEARING—November 22, 1943

Comes now the parties by counsel and the court being advised in the premises denies appellee's petition heretofore filed herein for an oral argument on petition for rehearing.

And the court being further advised in the premises, denies the petition of appellee heretofore filed herein for a rehearing.

[fol. 84] IN SUPREME COURT OF INDIANA

[Title omitted]

Petition for Appeal

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed February 17, 1944

To the Chief Justice of the Supreme Court of the State of Indiana:

PETITION FOR APPEAL

The petitioner, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, respectfully shows that he is the appellee in the above entitled cause; that the Supreme Court of Indiana rendered a final decision in said cause on the 22nd day of November, 1943; that said Supreme Court is the highest court of said State in which a decision in this suit can be had; that in said cause

[fol. 85] there is drawn in question the validity of a statute of the State of Indiana on the ground that said statute is repugnant to the Constitution and laws of the United States, and the said decision is in favor of its validity; and that the petitioner considers himself and the said trust estate aggrieved by said final decision.

Wherefore, the petitioner prays that an appeal be allowed from the Supreme Court of Indiana to the Supreme Court of the United States and that the appeal bond herewith tendered by the petitioner be approved.

ASSIGNMENT OF ERRORS

The petitioner, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, appellee in the above entitled cause and as appellant on appeal to the Supreme Court of the United States from the final decision and judgment heretofore entered herein by the Supreme Court of Indiana, assigns as error the following:

1. The Supreme Court of Indiana erred

a. in holding that the Gross Income Tax Act of 1933 (Ch. 50, Indiana Acts 1933; Burns Indiana Statutes Annotated 1933, Sec. 64-2601 et seq.) is valid as applied to gross receipts of appellant derived from sales of his corporate stocks and bonds conducted in interstate commerce, and that the tax imposed by said Act on such gross receipts is not invalid as constituting an [fol. 86] illegal burden on such commerce in conflict with Article I, Section 8 of the Constitution of the United States:

b. in refusing to hold that said Act when applied to gross receipts of appellant derived from such commerce among the several states is repugnant to Article I, Section 8 of the Constitution of the United States as imposing an illegal burden upon such commerce;

c. in holding that the intangibles, the corporate stocks and bonds, of the appellant sold and delivered by him as alleged and described in his complaint and in the stipulation of facts in said cause, were not subjects of commerce, and that the appellant's sales thereof to residents of other states of the United States did not constitute commerce between or among the sev-

eral states within the meaning of Article I, Section 8 of the Constitution of the United States;

d. in refusing to hold that the sales and deliveries of the intangibles, the corporate stocks and bonds, by the appellant to residents of other states, as alleged and described in his complaint and in the stipulation [fol. 87] of facts in said cause, constituted commerce among the several states protected by the commerce clause, Article I, Section 8 of the Constitution of the United States, against the tax imposed by said Gross Income Tax Act of Indiana; and

e. in reversing the judgment of the trial court and holding that said Act is valid and authorizes and requires the assessment and collection of the tax upon the gross receipts of appellant derived from such business conducted in interstate commerce.

PRAYER FOR REVERSAL

For which errors the said Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, as appellant on said appeal, prays that the said judgment of the Supreme Court of Indiana finally rendered on November 22, 1943, in the above entitled cause be reversed and a judgment ordered in favor of appellant and for costs.

Dated this 17th day of February, 1944.

(Signed) Gath P. Freeman, Attorney for Appellant.

[fol. 88] [File endorsement omitted.]

[fol. 89] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER ALLOWING APPEAL—Feb. 17, 1944

The petition of Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, appellee in the above-entitled cause, for an appeal in said cause to the Supreme Court of the United States from the judgment of the Supreme Court of Indiana, having heretofore been filed with the Clerk of this Court and presented herein and accompanied by assignment of errors, prayer for reversal of

the judgment, an appeal bond and a statement as to jurisdiction, all as provided by the statutes and the rules of the Supreme Court of the United States, and the record in this cause having been considered and the decision therein [fol. 90] to be appealed from constituting a final judgment of the highest court in the State in which a decision in said suit can be had, and it appearing that in this cause there is drawn in question the validity of a statute of the State of Indiana on the ground that it is repugnant to the Constitution of the United States, and said decision being in favor of the validity of such statute;

It Is Therefore Ordered that an appeal be and hereby is allowed to the Supreme Court of the United States as prayed for in said petition, and the Clerk of the Supreme Court of Indiana is hereby ordered and directed within forty days from this date to make and transmit to the Clerk of the Supreme Court of the United States under his hand and the seal of this Court a true, full and complete copy of all material parts of the record herein which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with the applicable statutes and the rules of the Supreme Court of the United States.

It Is Further Ordered that the cost bond of petitioner, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, as appellant in said appeal, in the sum of One Thousand Dollars ($1,000.00), with Hartford Accident and Indemnity Company as surety thereon, is a good and sufficient bond that said appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make his plea good in the Supreme Court of the United States, and the same is hereby approved.

[fol. 91] Dated this 17 day of February, 1944.

(Signed) Michael L. Fansler, Chief Justice of the Supreme Court of Indiana.

[File endorsement omitted.]

[fols. 92-98] Cost Bond on Apepal for $1000.00 approved and filed Feb. 17, 1944 omitted in printing.

[fols. 99-105] Citation in usual form showing service on James A. Emmert and Gilbert K. Hewit omitted in printing.

[fol. 106] IN THE SUPREME COURT OF INDIANA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed February 17, 1944

To the Hon. Thomas C. Williams, Clerk of the Supreme Court of Indiana:

Please include the following papers, pleadings, proceedings, parts and actions in the transcript of the record in the above entitled cause to be transmitted to the Supreme Court of the United States pursuant to the allowance of appeal thereto in said cause, and also please indicate as to all papers filed in your office the date of the filing of the same, as follows:

[fol. 107] 1. The transcript of record filed in your office which shows inter se:

(a) Plaintiff's complaint;
(b) Summons;
(c) Return of summons;
(d) Appearance;
(e) Answer of Defendant;
(f) Finding of Court;
(g) Judgment of Court;
(h) Defendant's motion for new trial;
(i) Motion for new trial overruled;
(j) Appeal granted;
(k) Praecipe for transcript;
(l) Bill of Exceptions; Plaintiff's Exhibit No. 1, Plaintiff's Exhibit No. 2, and Plaintiff's Exhibit No. 3, Stipulation of Facts.
(m) Certificate of Court Reporter;
(n) Certificate of Judge;
(o) Certificate of Clerk;
(p) Assignment of Errors.

2. The following parts or portions of appellant's printed brief in the Supreme Court of Indiana, specifying the points to be relied upon for reversal, appearing under the heading "Propositions, Points and Authorities", and including particularly the heading and all that part of said brief following, beginning at the top of page 23 of said brief and

[fol. 108] including all that part and pages thereof following to and including all of page 28 thereof.

3. Decision and order reversing judgment of trial court, and the opinion of Shake, J., for the Supreme Court of Indiana in said cause, rendered October 25, 1943.

4. The appellee's petition for rehearing.

5. The order of November 22, 1943, denying the petition for rehearing.

6. Petition for appeal to the Supreme Court of the United States, assignment of errors and prayer for reversal.

7. Order allowing said appeal and approving cost bond.

8. Cost bond and approval thereof.

9. Citation and proof of service thereof.

10. Proof of service of appeal papers.

11. This praecipe for transcript.

12. Any stipulation or orders settling the record.

13. Your certificate as to the record.

14. Statement as to jurisdiction of the Supreme Court of the United States filed with said petition for appeal, said statement to be separately certified to.

15. Also (to follow the parts of appellant's brief specified in specification 2 above) the following parts or portions of appellant's brief in the Supreme Court of Indiana: All [fol. 109] that appears on page 2 thereof under the heading "II—What the Issues Were", including the heading; and the last paragraph, or part of paragraph, at the bottom of page 37 of appellant's brief, which continues on page 38 thereof, and all that appears on page 38 of said brief.

(Signed) Gath P. Freeman, Attorney for Appellee, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, deceased.

Service and receipt of a copy of the above praecipe for transcript of record is acknowledged this 17th day of February, 1944.

(Signed) James A. Emmert, Attorney General of Indiana, Attorney for Appellant.

[fol. 109A] [File endorsement omitted]

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S STATEMENT OF POINTS ON WHICH HE INTENDS TO RELY AND DESIGNATION OF THE PARTS OF THE RECORD DEEMED NECESSARY FOR THE CONSIDERATION THEREOF AND TO BE PRINTED—Filed March 22, 1944.

Comes now Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, the Appellant on appeal to the Supreme Court of the United States in said cause, and adopts his assignment of errors in the appeal herein as his statement of the points on which he intends to rely in said appeal, and designates and represents that the whole of the record as filed is necessary for the consideration thereof and that the whole of said record [fol. 112] should be printed for use in said appeal, Except the following parts thereof:

Line 1, page 28, to line 4, page 36, inclusive, being Exhibit 1 and testimony identifying the same;

Line 16, page 37, to line 1, page 38, inclusive, being testimony identifying Exhibit 2;

Lines 19, 20 and 21, page 46, being the recital as to all the evidence;

Lines 1 to 16, inclusive, page 64, being entry concerning petition for extention of time to file brief.

Dated this 16th day of March, 1944.

Gath P. Freeman, Attorney for Appellant.

[fol. 113] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

[Title omitted]

APPELLEE'S COUNTER-DESIGNATION OF MATERIAL PARTS OF THE RECORD—Filed April 4, 1944.

Comes now Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, and designates and represents that the parts of the record hereinafter described are believed by him to be material

to a consideration of the above cause in addition to the parts of the record designated by the appellant, to-wit:

1. Exhibit 1 and the testimony identifying the same, appearing in the typewritten transcript filed in this cause at Line 1, Page 28 to Line 4, Page 36 inclusive;

2. The testimony identifying Exhibit 2 appearing in the transcript filed in this cause at Line 16, Page 37 to Line 1, Page 38 inclusive.

[fol. 114] Dated this 24th day of March, 1944.

James A. Emmert, Attorney General of Indiana. John J. McShane, Winslow Van Horne, Deputies Attorney General of Indiana, Attorneys for Appellee.

[fol. 115] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—April 3, 1944

The statement of jurisdiction in this case having been submitted and considered by the court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on cover: File No. 48,281, Indiana, Supreme Court. Term No. 40, Gath P. Freeman, Trustee under the will and of the Estate of Henry C. Starr, Deceased, Appellant, *vs.* Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana. Filed March 13, 1944. Term No. 40 O. T. 1944.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

Gath P. Freeman,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 788

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,
Appellant,

vs.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA.
Appellee.

ON APPEAL FROM THE SUPREME COURT OF INDIANA.

STATEMENT AS TO JURISDICTION.

Pursuant to paragraph 1 of the Rule 12 of the rules of the Supreme Court of the United States, the appellant [1],

[1] Note: The said Gath P. Freeman, as Trustee aforesaid, was plaintiff in the trial court, appellee in the Supreme Court of Indiana, and is appellant in this appeal to the Supreme Court of the United States. The said Gilbert K. Hewit, as Director aforesaid, was defendant in the trial court, appellant in said State Supreme Court, and is appellee in this said appeal.

In this Statement as to Jurisdiction (except quotations) "appellant" always refers to said Gath P. Freeman, as Trustee aforesaid, and "appellee" always refers to said Gilbert K. Hewit, as Director aforesaid.

submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

1.

Form and Nature of Action.

Appellant brought this suit against appellee, as taxing officer of the State of Indiana to recover the sum of $652.14 gross income tax imposed and collected by appellee from appellant on account of gross receipts of appellant from sales of certain intangibles, corporate stocks and bonds, of appellant by him sold and delivered in the year 1940 in interstate transactions to persons who were residents of other States of the United States, the appellant being domiciled in and a resident of Indiana and said sales having been made through the New York Stock Exchange in the usual and customary way and in accordance with the rules and regulations of said Exchange. The appellant paid said tax under protest and filed a claim for refund thereof with the appellee, who denied and refused said claim for refund, and thereafter the appellant brought this suit to recover the amount of said tax so paid. It is shown in the stipulation of facts that all steps necessarily precedent to the institution of said action had been taken by appellant and appellee (R. 46).

The appellant filed his complaint in said action in the Wayne Circuit Court of Indiana on the 27th day of January, 1942. The appellee appeared by counsel, the Attorney General of Indiana, and on the 21st day of February, 1942, filed answer to the complaint in said cause. On February 18, 1943, said cause was submitted to the court for trial, finding and judgment on said stipulation of facts and certain documents introduced in evidence, and briefs were submitted by the parties by way of argument. On March 26,

1943, the trial court entered judgment in favor of the appellant for the recovery of said sum of $652.14, with interest thereon, and costs, representing the amount of said tax so imposed and collected by the appellee (R. 23).

The only ground alleged in the complaint for the recovery of said tax are the averments that each and all of said sales of stocks and bonds were transactions in interstate commerce and were exempt from the payment of gross income tax to the State of Indiana and that the gross income tax charged and collected therefor or on account thereof constituted a regulation of and a burden upon commerce between the State of Indiana and the State of New York or other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States (R. 12-13). The appellee joined issue thereon by his answer to the complaint (R. 18). While the judgment of the trial court is general in form, for the recovery of said tax, interest and costs, with no special findings of fact or conclusions of law, said court necessarily passed upon said Federal question in finding that the allegations of appellant's complaint were true and in rendering judgment accordingly in favor of the appellant for the recovery of said tax (R. 22). For further statement in this respect see discussion under "Origin of Federal Questions and Rulings of Courts Below", *infra*.

It appears from the stipulation of facts that the appellee, Gilbert K. Hewit, is the Director of Gross Income Tax Division, Department of Treasury of the State of Indiana, and was duly designated by the Governor of said State of Indiana as such Director and as the Chief Administrative officer charged with the administration and enforcement of the Indiana Gross Income Tax Act of 1933, and the acts amendatory thereof and supplemental thereto (R. 39).

2.

Statute Sustaining Jurisdiction.

The statutory provision believed to sustain jurisdiction of the Supreme Court of the United States is Section 237 (a) of the Judicial Code, as amended, reading, to the extent relevant here, as follows:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *" (Act of Congress Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. C. Sec. 344 (a).)

The remedy by writ of error under the foregoing Section has been abolished and appeal substituted. (Act of Jan. 31, 1928, c. 14, Secs. 1 and 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466; Title 28 U. S. C. Sec. 344 (a), Sec. 861 (a) Sec. 861 (b).

3.

State Statute Involved.

The statute of the State of Indiana, the validity of which is drawn in question, is Chapter 50, Indiana Acts 1933, page 388, known as "Gross Income Tax Act of 1933", as amended March 9, 1937, Indiana Acts 1937, Chapter 117, page 604, Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2601 *et seq.*

The pertinent provisions of the Act are set forth as follows:

Section 1 comprises definitions, including those of the terms "person" and "gross income", as follows:

"(a) When used in this act the term, "person" or the term "company", herein used interchangeably, means and includes any individual * * * fiduciary, trustee, executor * * * corporation * * * engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit * * *" (Sec. 64-2601, supra: Sec. 1, Ch. 117, Indiana Acts 1937, p. 604.)

(m) The term "gross income", except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, * * * and the gross receipts of the taxpayer received from trades, businesses, or commerce, * * * and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets * * * damages, or judgments, and all receipts received by reason of the investment of capital, including but not in limitation thereof, interest, discounts, rentals, royalties, dividends, fees, commissions, and receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations, and all other receipts of any kind or character received from any source whatsoever, and without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character: Provided, however, * * *"

(Here follow certain exceptions not pertinent to this case.) (Sec. 64-2601, supra; Sec. 1, Ch. 117, Indiana Acts 1937, p. 606, 607.)

Section 2 describes the general scope of the Act, as follows:

> "Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided." (Sec. 2, Ch. 117, Indiana Acts 1937, p. 611; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2602.)

Section 3 contains the specific imposition of the tax upon different types of gross income or receipts and specifies the rates applicable thereto. The provisions of Section 3 pertinent to this case are as follows:

> "Sec. 3. The tax upon the receipt of gross income hereby provided for, shall be measured by the amount or volume of such gross income and shall be imposed at the following rates:
>
> "'(f) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal services . . . all funds received from

the investment of capital, and all receipts received from any source whatsoever, the tax shall be equal to one per cent of such part of the gross income." (Sec. 3, Ch. 117, Indiana Acts 1937, p. 611, 613; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2603.)

(Note: Subsections (a) to (e), inclusive, provide, respectively, for a tax of one-fourth of one per cent on gross receipts from wholesale sales, display advertising, and one per cent on retail sales, utility service and banking or loan business.)

Section 5 provides for a deduction or exemption of $1000 annually from the gross income of each taxpayer, except retailers, whose deduction is $3000. (Sec. 5, Ch. 117, Indiana Acts 1937, p. 614.)

Section 6 is a disclaimer of intention to tax receipts derived from interstate commerce, designed to preserve the constitutionality of the Act, and reads as follows:

"Sec. 6. There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent of which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America * * *." (Sec. 6, Ch. 117, Indiana Acts 1937, p. 615; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2606.)

Subsection (c) of Section 8 provides as follows:

"(c) Trustees of trust estates, created by will, by contract, by declaration of trust, or by implication of law, shall make returns covering all gross income received by the trust in accordance with such provisions of this act as apply to individuals and other tax-

payers. Only one deduction as provided in section 5 may be taken on such return, regardless of the number of beneficiaries of the trust." (Sec. 8 (c), Ch. 117, Indiana Acts 1937, p. 619; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1943, Sec. 64-2608.)

This Act contains provisions for collection of the tax, penalties for delinquency, the right to command the sheriff by warrant to levy upon the property of the taxpayer, and to enjoin a delinquent taxpayer from continuing in business, and other remedies, both civil and criminal, to enforce collection of the tax. (Sec. 13, Ch. 117, Indiana Acts 1937, p. 628-631; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1943, Sec. 64-2613.)

Regulations, Gross Income Tax Division.

ISSUED APRIL 15, 1940.

The pertinent Regulations of the Gross Income Tax Division of Indiana, are as follows:

"Regulation 3900. Interstate Commerce. (The first paragraph recites the provisions of Section 6 (a) of the Gross Income Tax Act, supra, excepting interstate commerce transactions from the purview of the Act.)

"The Department does not include herein any specific rulings on interstate commerce since such transactions involve many technical features, and court decisions vary in their determinations of its necessary elements. Therefore, each question involving interstate commerce must be submitted to the Department and will be considered on its individual merits and the Department herein reserves the right to adjudicate in every case whether or not there exist sufficient elements of interstate commerce to exempt from tax the receipts of any particular transaction.

"Whenever any taxpayer considers any of his receipts to be exempt from gross income tax because of the immunity of an interstate commerce transaction, he will be required to submit all of the facts * * * and such other relevant data as may be required by the Department.

"All taxpayers who are required to file gross income tax returns must include thereon all receipts derived from interstate commerce transactions even though such receipts are not taxable. Proper deductions may then be made on the return for non-taxable receipts.

"The Department will not interpret hypothetical questions involving interstate commerce." (Official Regulations 1940, Article 39, p. 79.)

INTANGIBLES.

Regulation 1212 is merely declaratory of the law as provided in the Act (Section 1 (m), supra.) and is as follows:

"Regulation 1212. Other Intangibles. Gross receipts from the sale of intangible property are taxable at the rate of 1%. The term intangible property includes notes, stocks in either foreign or domestic corporations bonds, debentures, * * * and any and all other intangibles capable of being transferred, acquired or sold. The physical situs of the intangibles shall have no bearing upon the taxability of the receipts from the sale or transfer thereof. * * *" (Official Regulations 1940, Reg. 1212, Article 12, p. 21.)

DEFINITIONS.

Regulation 100 is merely declaratory of the law as provided in the Act, defining the word "person" (Section 1 (a) of the Act, supra.) and is as follows:

"Regulation 100. PERSON and TAXPAYER are synonomous and taxable persons are those defined herein who are within the qualifications of Reg. 101.

"PERSON includes any 1. Individual—5. Fiduciary

—6. Trustee—28. Estate—29. Trust * * * (Sec. 1 (a).)".

Out-of-State Sources of Income

"Rule 7—Sales of Intangible Assets. Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property where the legal situs of such property is in Indiana, even though sale is made outside the state. * * * This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. The legal situs of all intangibles is presumed to be the domicile of the owner. * * *" (Official Regulations 1940, Reg. 3500, Article 35, Rule 7, p. 72.)

4.

The Opinion Below.

The opinion of the Supreme Court of Indiana and judgment of said Court, reversing the judgment of the trial court, rendered by Hon. Curtis G. Shake, Associate Judge, is set out in full as Appendix A hereto. There was no dissenting opinion. The opinion in the case is not yet officially reported, but is shown in 51 N. E. (2d) 6; also R. 66, App. 152.

5.

Finality of the Judgment.

Under the established practice of Indiana, the judgment of the Supreme Court of Indiana in an appealed case consists of the order made at the close of the deciding opinion. The Clerk makes a minute of the decision and order, which is signed by the Chief Justice, and no separate or other judgment is entered. The judgment so made when

the case is decided stands for sixty days and then becomes final, unless a petition for rehearing has been filed. If a petition for rehearing is filed, the judgment of the Court becomes final when the rehearing is denied. The controlling provisions of the Constitution and statute are:

> "The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon." (Constitution of Indiana, Article 7, Section 5.)
>
> "When any cause is determined in the Supreme Court, the Clerk shall forthwith notify the clerk of the court below that it is determined, and whether reversed or affirmed in whole or in part, or dismissed. At any time within sixty (60) days after such determination, either party may file a petition for a rehearing; if not so filed the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court. (Acts 1881 (Spec. Sess.) Ch. 38, Sec. 650, p. 240; Burns Ind. Stat. Ann. 1933, Sec. 2-3236.)

In this case the deciding order, which became the final judgment when rehearing was denied, found at the end of the Supreme Court's opinion, reads:

> "The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant." (R. 74), 51 N. E. (2d) 6, 8.

The decision in this case was rendered on October 25, 1943. Petition for rehearing was filed November 13, 1943. Rehearing was denied on November 22, 1943. (R. 83).

This is the final judgment from which the appeal is properly taken, and from the date of which, November 22, 1943, the time for making the application for appeal began to run. This is in accordance with a decision of the Su-

preme Court of the United States on an appeal from Indiana.

Citizens Bank of Michigan City, Ind. v. *Opperman*, 249 U. S. 448, 449.

The judgment is final in that it completely determines the controversy, leaving nothing to be done except the ministerial act of enforcement. The judgment denies relief to appellant and orders a reversal of the judgment of the trial court and an entry of judgment for the appellee in accordance with the opinion. The judgment appealed from is final within the meaning of the Judicial Code, Sec. 237 (a), as amended February 13, 1925.

6.

Timely Application for Appeal.

Rehearing was denied November 22, 1943. The petition for appeal to the Supreme Court of the United States, accompanied by assignments of error, prayer for reversal, and this statement as to jurisdiction, as required by Rule 12 (1) of said Court, was on the 17th day of February, 1944, filed and presented to the Hon. Michael L. Fansler, Chief Justice of the Supreme Court of Indiana, and by him allowed on the *17th* day of February, 1944 (R. 89). Thus, the application for appeal was made within three months after the entry of final judgment, as provided in the Act of Feb. 13, 1925, c. 229, Sec. 8 (a), 43 Stat. 940, 28 U. S. C., Sec. 350.

7.

Origin of Federal Questions and Rulings of Courts Below.

The Gross Income Tax Act of 1933, as amended, was challenged by the appellant in both courts below as being repugnant to the Constitution of the United States, as applied

to the receipts of appellant from sales of his corporate stocks and bonds and deliveries thereof from his domicile or residence in Indiana by United States mail in interstate commerce through the New York Stock Exchange to persons resident of other states of the United States.

The complaint shows on its face that this is the only issue or ground alleged in the complaint for the recovery of the tax paid. The appellee joined issue thereon by his answer, and the case was submitted to the trial court on a stipulation of facts (R. 37) and certain letters between the parties. There was no dispute of fact, and the only issue in the case in either the trial court or the Supreme Court of Indiana was the question of law whether the application of the Gross Income Tax Act and the tax imposed thereby to the receipts of appellant from the interstate sales and deliveries of his stocks and bonds as alleged in his complaint and in the stipulation of facts was repugnant to Article I, Section 8 of the Constitution of the United States as constituting a regulation of and burden upon interstate commerce.

It is shown by the complaint, the answer, the stipulation of facts, the judgment of the trial court and the proceedings on appeal, that an actual controversy exists between the parties to the action, particularly in respect of said Federal question, which was raised at the times and in the stages in the proceedings and in the manner as follows:

(a) Trial Court. The Complaint Raised the Federal Question.

The appellant in his complaint filed in the trial court alleged (Third literary paragraph):

> "That the plaintiff on the 28th day of January or the 29th day of January, 1941, filed with and in the office of the Gross Income Tax Division of the State of Indiana, as required by law, a Fiduciary Gross In-

come Tax Return for said trust estate for the period beginning January 1, 1940, and ending December 31, 1940, and paid the total balance of tax indicated thereon in the sum of $760.74. That in and by said return the plaintiff reported and returned on line 3 thereof *under protest* the sum of $65,214.20 constituting and being the amount of gross receipts and total sale prices received by the plaintiff from the sale of intangible personal property consisting of corporate stocks and bonds of foreign corporations belonging to said trust estate and sold by the plaintiff in *interstate commerce* in the year 1940 *to residents of states other than the State of Indiana.*" (R. 10)

and (Fifth literary paragraph):

"That each and all of said sales of said property were made by the plaintiff through the New York Stock Exchange or in over the counter market in the city of New York, in the State of New York, to persons who were *residents of states other than the State of Indiana,* and that upon the sales of said property being effected through such stock exchange or in such over the counter market the plaintiff herein *shipped or mailed* by *United States mail from* the *City of Richmond, in the State of Indiana,* the *stock certificates* and/or the *bonds* hereinabove described *to the broker* representing this plaintiff *in said City of New York* for *delivery there* to the respective purchasers upon the respective sales so made, and that said *stock certificates* and said *bonds* were *delivered* to such respective purchasers thereof *in said State of New York* in execution, completion and consummation of the sales so made. That each and all of said *sales of said property* were *transactions in interstate commerce* and were and are *exempt from the payment* of *Gross Income Tax* to the State of Indiana and that *no gross income tax* was or is *due or payable* to the State of Indiana on account of the same by reason of the fact that all of said *transactions constituted* and were *interstate commerce* and that the gross receipts of the plaintiff therefrom were

receipts from business conducted in commerce between the State of Indiana and State of New York or other states of the United States, and the *gross income tax charged and collected* therefor or on account thereof *constituted a regulation of* and a *burden upon commerce* between the State of Indiana and other states of the United States *in conflict* with *Article I, Section 8* of the *Constitution* of the *United States*, and that the *State of Indiana* and the defendant herein was and is *prohibited from taxing* such *gross income or receipts* under the Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto." (R. 12-13). (Original complaint not in italics)

The prayer of the complaint was general, demanding judgment for the amount of the tax so paid, $652.14, with interest from date of payment of said tax, and costs. (R. 14)

(b) Trial Court. The Answer Joined Issue on the Federal Question.

(Under the rules of procedure and practice in trial courts in Indiana, the party answering or replying to a pleading is required to state, without enlargement or elaboration, that he admits, denies or is without information as to the facts stated in each rhetorical paragraph or each designated part of such paragraph. A statement that the pleader is without information as to the facts alleged has the effect of a denial thereof. Rule 1-3, Supreme Court.)

The appellee filed answer as required by the rules alleging in part (Paragraph 3):

"In answer to the third literary paragraph of plaintiff's complaint, the defendant—admits that such return reflected a sum of $65,214.20, but this defendant is without knowledge as to the source of such income; and the defendant denies that such income was received from transactions in interstate commerce." (R. 17-18)

and (Paragraph 5):

> "The defendant is without knowledge of the truth or falsity of the allegations of the plaintiff in his fifth literary paragraph of complaint that the sales referred to were made in stock markets in New York, New York; that such sales were made to residents of states other than the State of Indiana; that such stocks and bonds were mailed from Richmond, Indiana, to plaintiff's broker in New York, New York; and that such stocks or bonds were delivered to purchasers in New York, New York. The *defendant denies* that the *sales* referred to *were sales in interstate commerce;* that such sales *were exempt from Indiana Gross Income Tax;* and that the *tax collected by* the *State of Indiana* constituted a *regulation and burden upon commerce* between the State of Indiana and other states of the United States, *in conflict with Article I, Section 8* of the *Constitution of the United States.*" (Our italics). (R. 19)

and (Paragraph 6):

> "The defendant admits—that a Gross Income Tax Return was filed by plaintiff for the year 1940; that such return was filed *under protest;* and that a tax in the amount of $652.14 was paid on an item listed on such return in the amount of $65,214.20, but the defendant is without knowledge of the source of such income to plaintiff; further defendant denies that the tax in the amount of $652.14 was improperly charged and collected from plaintiff by defendant." (Our italics). (R. 19-20)

and (Paragraph 8):

> "The defendant admits that the refund claimed by plaintiff has been refused by defendant and that no part of the tax paid by plaintiff to defendant for the year 1940 has been refunded by defendant; the defendant further admits that plaintiff has taken all steps required by law precedent to the bringing of this

action; but defendant denies that there is any amount due plaintiff by defendants." (R. 20)

(c) Trial Court. Judgment Passed on Federal Question.

While the judgment of the trial court was general in form, finding generally for the plaintiff (the appellant herein) and against the defendant (the appellee herein) that the allegations of the complaint were true and that the prayer of the complaint should be granted and plaintiff should recover from defendant the sum of $652.14 with interest thereon from date of payment of tax, January 29, 1941, and costs, and judgment was rendered and entered accordingly, with no special findings of fact or conclusions of law, the judgment necessarily passed upon said Federal question, as that was the only issue raised by the pleadings or on which the case was tried. (R. 22). (See Stipulation of Facts, R. 38-46)

(d) Trial Court. Motion for New Trial.

According to Indiana practice a motion for new trial was filed by appellee on the grounds that the decision of the court was not sustained by sufficient evidence and was contrary to law, which was overruled (R. 23-25).

(e) State Supreme Court. Federal Question Properly Presented.

An appeal was taken by appellee (defendant below) to the Supreme Court of Indiana, and the error assigned was the overruling of the motion for a new trial (R. 7). Under the practice in Indiana, the specific legal points relied upon are presented in appellant's brief under his "Propositions, Points and Authorities." Appellee's brief (Appellant's brief in the Supreme Court of Indiana), under this heading, presented the following:

"Proposition I:

"Indiana, Being the Domicile of the Seller, is Privileged to Tax."

"This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

'1. The trial court erred in overruling appellant's Motion for a New Trial, which motion contained the following specifications:

'1. The decision of the Court is not sustained by sufficient evidence.

'2. The decision of the Court is contrary to law.'" (R. 7).

"Point 1:

"The taxpayer is domiciled within Indiana and therefore Indiana has the power, and does impose an income tax upon him regardless of the source of the income. * * * (R. 57a).

"Point 3:

"Stock certificates and bonds are documents which are evidences of the number of shares of stock which the holder of them owns or the amount of money due a lender and do not in themselves constitute choses of action or property" (R. 58).

"Proposition III:

"The Prohibition of the Commerce Clause on Taxing Income from Tangible Property Does Not Apply to the Tax on Income When Intangibles are Involved * * * (R. 61.)

"Point 1:

"The vice of a tax measured by gross receipts (such as the Indiana Gross Income Tax) on tangible property levied by the jurisdiction from which the goods are shipped is that there is a possibility that the same type of tax could be levied by other jurisdictions and

thus tangible merchandise in interstate commerce might be subjected to a multiple tax burden not borne by local commerce.

J. D. Adams Mfg. Co. *v.* Storen (1938), 304 U. S. 307" (R. 62).

"Point 3:

"Intangible property can be the subject or measure of a tax in as many jurisdictions as give privileges or benefits to the owner of the intangible property. Appellee being domiciled in Indiana, the imposition of this tax is valid, there being *no constitutional objection thereto*" (R. 63). (Our italics.)

The appellee acknowledged and conceded that said Federal question was the only issue in the case, by stating in his brief on appeal to the Supreme Court of Indiana that:

"The appellee (appellant herein) contended that the amounts received by him and covered by the evidence constituted gross income derived from business conducted in commerce between the State of Indiana and other states of the United States to such an extent that the State of Indiana is prohibited from taxing such income by Section 8, Article I of the Constitution of the United States of America.

"The appellant (appellee herein) contended that the transactions reflected by the evidence did not constitute that type of commerce which the State of Indiana is prohibited from taxing under the provisions of the Commerce Clause of the Federal Constitution" (R. 57).

and further that:

"No constitutional objection can be successfully made against the taxation of the resident trustee involved here, measured by the gross receipts from his sales of intangibles—his sales of rights, the legal situs of which follow his person like the residence of an infant child follows that of his parents. An *intangible right* is *incapable of shipment* in *interstate commerce*,

therefore the ADAMS case and other cases of the same type involving shipments of corporeal objects in the channels of interstate trade can have no practical application here." (R. 63) (Our italics.)

(F) Highest State Court Decision in Favor of Validity of Statute.

The Supreme Court of Indiana treated the Federal question as properly raised and passed upon it. The Supreme Court ordered the judgment of the lower court reversed with instructions to enter judgment for the appellee, and without dissenting opinion, in its opinion stated:

"The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation: (Here follows Par. 5 the Stipulation of Facts in full) (R. 66). (Appendix, 153) "The question presented by this appeal is whether the appellee (appellant herein) is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933.—Section 6 of that act exempts so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States" (Appendix A, p. 157; R. 70; 51 N. E. (2d) 6, 7).

and the court further stated that:

"Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather a protection against such commerce being subjected to the

onerous burdens of multiple exactions" (Appendix A, p. 153; R. 71; 51 N. E. (2d) 6, 7).

and the Court further stated that:

"Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected. * * *

J. D. Adams Mfg. Co. *v.* Stôren (1938), 58 Sup. Ct. 913, 304 U. S. 307."

(Appendix A, p. 158, R. 71; 51 N. E. (2d) 6, 8), and the Court concluded, after citing and reviewing a number of decisions touching the commerce clause of the Constitution, that:

"The stipulated facts disclose a sufficient basis for imposing upon the appellee (appellant herein) a tax measured by the gross income derived from the sales therein described."—(Appendix A, p. 160; R. 74; 51 N. E. (2d) 6, 8).

The Supreme Court of Indiana in its opinion cites and purports to rely upon the following cases to demonstrate that the tax is not repugnant to the commerce clause of the Constitution of the United States:

J. D. Adams Mfg. Co. v. *Storen* (1938), 58 Sup. Ct. 913, 304 U. S. 307.

Dept. of the Treasury v. *Allied Mills, Inc.* (1942), 42 N. E. (2d) 34, affirmed by the United States Supreme Court Feb. 15, 1943, — U. S. —, 87 L. Ed. —, 63 Sup. Ct. 666.

O'Kane v. *State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905.

Union Refrigerator Transit Co. v. *Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36.

Buck v. *Beach* (1906), 206 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732.

Blodgett, Tax Commissioner of the State of Conn. v. *Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410.

Croop v. *Walton* (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386.

Miami Coal Co. v. *Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333.

Holland Furnace Co. v. *Dept. of Treasury* (1943), — C. C. A. —, 133 F. (2d) 212.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. E. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162.

Thus the Federal question was presented at the earliest opportunity in the trial court, was presented to, entertained by and decided by the Supreme Court, the highest court in the State of Indiana in which a decision in the suit could be had, and that decision was in favor of the validity of the State statute.

8.

Federal Questions Necessarily Decided.

Appellant in both State Courts claimed exemption from the tax on certain types of gross receipts on the sole ground that the exaction of the tax on such gross receipts was in violation of specified provisions of the Federal Constitution.

By judgment of the trial court, appellant was exempted from the tax, the judgment being for the recovery of the

amount of tax paid on the disputed types of gross receipts. By the judgment of the State Supreme Court appellant is compelled to pay the tax on such gross receipts. It therefore appears affirmatively from the record that the Federal questions were presented for decision to the highest court of the State having jurisdiction, that its decision of the Federal questions was necessary to the determination of the cause, that the questions were actually decided, and that the judgment as rendered could not have been given without deciding them.

Lynch v. *New York ex rel.*, 293 U. S. 52, 54.

9.

Highest State Court Is the Supreme Court.

Under the Constitution of Indiana, the jurisdictional power of the State is vested in a Supreme Court, and it is the court of last resort within the State in which a decision could be had. There is no other or higher court in Indiana to which the questions stated in the assignment of errors could be presented, or by which they could be decided.

Constitution of Indiana, Article 7, Sec. 1;
Ex Parte France, 176 Ind. 72, 80-81;
Curless v. *Watson*, 180 Ind. 86, 92-93.

10.

Federal Questions Are Substantial.

The questions involved are substantial because the ultimate decision thereon in this appeal to the Supreme Court of the United States will determine the validity of the Gross Income Tax Act of 1933, as amended, of the State of Indiana, as applied to the gross receipts of appellant from sales of intangibles, corporate stocks and bonds, sold

and delivered in transactions interstate in the year 1940, as well as subsequent and future years, and will determine the validity of the judgment of the trial court in favor of the appellant for the recovery of said large amount of money paid under protest to the appellee as taxes under said Act imposed and collected from appellant by appellee on account of such gross receipts derived by appellant from commerce between the State of Indiana and the State of New York or other states of the United States; and said questions are substantial because corporate stocks and bonds are owned and held generally throughout the State of Indiana by the citizens thereof and by them from time to time sold and delivered in interstate commerce, and, like the case of

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, *supra*,

the leading Indiana case which by declaratory judgment decided the invalidity and unconstitutionality of said Act as applied to sales interstate or to foreign countries of manufactured goods or commodities, will establish a precedent as to the validity of said Act as applied to sales interstate of such intangibles.

Practically all securities sold by appellant in handling the investments of said trust are sold through the New York Stock Exchange, and many securities can be sold no other way, listed securities in particular. As was well said in the case of

General Motors Acceptance Corporation v. *Huron Finance Corporation et al.*, (1935), 262 N. W. 195,

in holding that stocks and bonds are proper subjects of interstate commerce, the transactions in such personal property from one state to another "for the purpose of barter and sale and delivery constitutes not only commerce among the states of this country, but constitutes a *very*

large and important element of such commerce." (Our Italics.)

However, the volume of interstate commerce transactions is immaterial, as was held in the case of

Electric Bond & Share Co. v. *Securities and Exchange Commission* (1937), 92 Fed. (2d) 580, 588.

The imposition of the tax upon such gross receipts of appellant at the rate of one per cent involves a substantial tax liability each year, and precludes the making of many sales in commerce between the State of Indiana and other states not only by appellant but by many other residents of Indiana, thereby reducing the volume of such commerce and thwarting and hampering the same contrary to and in violation of Article I, Section 8 of the Federal Constitution. A larger tax rate could and would destroy all such commerce.

The imposition of this tax upon the gross receipts of appellant derived from interstate commerce is a clear invasion of a substantial right of appellant under said commerce clause. It has always been held by the Supreme Court of the United States that a *tax upon gross receipts* from interstate and foreign commerce *is a tax upon the commerce itself* and is forbidden by the Constitution. The following cases support appellant's position on this question:

J. D. Adams Mfg. Co. v. *Storen, Chief Administrative Officer, et al.* (1938), 304 U. S. 307, 58 Sup. Ct. 913.

Allied Mills, Inc. v. *Department of Treasury* (1943), 63 Sup. Ct. 666, affirming —— Ind. ——, 42 N. E. (2d) 34 (1942).

Gwin, White & Prince, Inc. v. *Henneford, et al.* (1938), 59 Sup. Ct. 325, 305 U. S. 434.

In Re Globe Varnish Co. (1940), 114 Fed. (2d) 916, 312 U. S. 690.

Galveston, H. & S. A. Ry. Co. v. *Texas* (1907), 210 U. S. 217, 28 Sup. Ct. 638.

Crew Levick Co. v. *Commonwealth of Pennsylvania* (1917), 245 U. S. 292, 38 Sup Ct. 126.

Stockard v. *Morgan* (1901), 185 U. S. 27, 22 Sup. Ct. 576.

Postal Telegraph Cable Co. v. *Adams* (1895), 155 U. S. 688, 695, 15 Sup. Ct. 268.

State Freight Tax (1872), 15 Wall. 232, 277, (21 L. Ed. 146).

United States v. *Ohio Oil Company* (1913), 234 U. S. 548.

Pennsylvania R. Co. v. *Clark* (1915), 238 U. S. 456.

Pennsylvania R. Co. v. *Soman Shaft Coal Co.* (1916), 242 U. S. 120.

Texas & N. O. R. Co. v. *Sabine Tram Co.* (1913), 227 U. S. 111.

Dahnke-Walker Milling Co. v. *Bondurant* (1921), 257 U. S. 282.

Sioux Remedy Co. v. *Cope* (1914), 235 U. S. 197.

Furst v. *Brewster*, 51 Sup. Ct. 295.

Electric Bond & Share Co. v. *Securities and Exchange Commission* (1937), 92 Fed. (2d) 580, 588.

Andrews v. *Montgomery-Ward & Co.* (1939), 30 F. Supp. 380.

McGoldrick, etc. v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 60 Sup. Ct. 388, 394.

General Motors Acceptance Corp v. *Huron Finance Corp., et al.* (1935), 262 N. W. 195.

Also: 36 Illinois Law Review 727-746 (March 1942; see pages 738-9).

And the following cases support appellant's proposition that intangibles, corporate stocks and bonds, are subjects of commerce and interstate commerce and transportation, and that interstate sales and deliveries thereof are pro-

tected by the commerce clause of the Federal Constitution against the burden of state taxation:

Oklahoma-Texas Trust v. *Securities and Exchange Commission* (1939), 100 Fed. (2d) 888.

Parey v. *Bache* (1942), 125 Fed. (2d) 493.

General Motors Acceptance Corp. v. *Huron Finance Corp, et al.* (1935), 262 N. W. 195, supra.

Electric Bond & Share Co., et al. v. *Securities and Exchange Commission, et al.* (1937), 92 Fed. (2d) 580, 589, 590, supra, affirmed by U. S. Supreme Court, 303 U. S. 419, 58 Sup. Ct. 678.

O'Kane v. *State* (1940), 28 N. E. (2d) 905.

Securities and Exchange Commission v. *Torr* (1936), 15 F. Supp. 315.

Securities and Exchange Commission v. *Bailey* (1941), 41 F. Supp. 647.

Securities and Exchange Commission v. *Payne* (1940), 35 F. Supp. 873.

Securities and Exchange Commission v. *Tung Corp.* (1940), 32 F. Supp. 371.

Jones v. *Securities and Exchange Commission* (1935), 79 Fed. (2d) 617, 619.

Bracey v. *Darst* (D. C.) (1914), 218 Fed. 482.

Industrial Acceptance Corp. v. *Haering* (1929), 253 Ill. App. 97.

Champion v. *Ames* (1903), 23 Sup. Ct. 321.

The question therefore of whether the Gross Income Tax Act of 1933, as amended, can validly be applied to the receipts of appellant from such sales of intangibles, corporate stocks and bonds, in interstate commerce, does involve a substantial Federal question.

The opinion and judgment of the Supreme Court of Indiana could not have been rendered or entered without denying to appellant all of the rights asserted by him under

the constitutional provisions relied upon, and said opinion and judgment can not rest upon any independent non-Federal grounds.

It is submitted that the judgment definitely and clearly draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Sec. 237 (a) of the Judicial Code as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Dated this 17th day of February, 1944.

Respectfully submitted,

(Signed) GATH P. FREEMAN,
Attorney for Appellant, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased.

APPENDIX A.

THE STATE OF INDIANA,

IN THE SUPREME COURT, MAY TERM, 1943.

On the 25th day of October, 1943, being the 131st Judicial day of said May Term, 1943.

No. 27881.

HON. H. NATHAN SWAIM, Chief Justice; HON. MICHAEL L. FANSLER, HON. CURTIS G. SHAKE, HON. MART J. O'MALLEY, HON. FRANK N. RICHMAN, Associate Judges.

In the case of

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, *Appellant*,

vs.

GATH P. FREEMAN, Trustee under the will and of the Estate of Henry C. Starr, Deceased.

Appealed from the Wayne Circuit Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

SHAKE, *J.*:

During 1940 the appellee, who was domiciled in Indiana, paid, under protest, Indiana Gross Income Taxes calculated on proceeds derived from the sale of corporate stocks and bonds of foreign corporations. Subsequently, the appellee brought this action and recovered the amount of taxes so paid. The State has appealed from the overruling of its motion for a new trial, which asserted that the decision was contrary to law.

The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation:

"5. The sales of the above described corporate stocks and bonds were twenty separate sales made from

time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds accord-

ing to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States Mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as a broker to procure sales thereof on or for commissions. All of said sales were handled

in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms, or corporations resident in states other than Indiana."

The question presented by this appeal is whether the appellee is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933. § 64-2601 et seq., Burns' 1933, § 15981 et seq., Baldwin's 1934. Section 6 of that act exempts "So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States."

Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather a protection against such commerce being subjected to the onerous burdens of multiple exactions. "The validity of State regulation under the commerce clause is to be determined by the balancing of two considerations: that State government shall be able to derive revenue for its support, and that commerce among the States shall be unfettered by

provincial impediments. Stated conversely, interstate commerce must bear its share of the tax burden along with intrastate commerce, but the states may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay.

O'Kane *v.* State (1940), 283 N. Y. 439, 28 N. E. (2nd) 905.

Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected.

Dept. of the Treasury *v.* Allied Mills, Inc. (1942), — Ind. —, 42 N. E. (2nd) 34

affirmed by the United States Supreme Court February 15, 1943,—U. S.,—87 L. Ed. —, 63 Sup. Ct. 666.

J. D. Adams Mfg. Co. *v.* Storen (1938), 58 Sup. Ct. 913, 304 U. S. 307.

The situs of intangible property, such as stocks and bonds, is not of a transitory character. As to assets of this type there has been applied the rule of "mobilia sequuntur personam"—the situs of the property is the domicile of the owner. This doctrine maintains generally in the absence of a statute or of peculiar facts forcing a different conclusion.

Cooley, Taxation (4th Ed.), § 440.

Union Refrigerator Transit Co. *v.* Kentucky (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36.

Buck *v.* Beach (1906), 206 U. S. 392, 51 L. Ed. 150, 26 Sup. Ct. 36.

Blodgett, Tax Commissioner of the State of Conn. *v.* Silberman (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410.

Croop *v.* Walton (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386.

No such statute has been called to our attention and no such facts are disclosed by the stipulation. It must, therefore, be concluded that the situs of the stocks and bonds sold by the appellee was in this state, where he was domiciled. For a discussion of the circumstances that may establish for intangible property a situs different from the domicile of the owner see

Miami Coal Co. *v.* Fox, Treas. (1932), 203 Ind. 69, 176 N. E. 11, 79 A. L. R. 333.

The appellee concedes that the law is as stated above, but he relies upon the proposition that the sale of said securities, in the manner described by the stipulation, constituted transactions in interstate commerce. He leans upon the circumstances that the offers of sale, the acceptance of the offers, the delivery of the certificates evidencing ownership and the remittance of the proceeds by the broker in New York to him in Richmond, Indiana, were effectuated by the facilities of interstate commerce. Having admitted the major premise, the appellee's contention must fail. If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers. The activities of the appellee's agents in making the sales did not change the situs of his securities any more than they affected his domicile. That said activities incidentally involved interstate commerce is immaterial.

Holland Furnace Co. *v.* Dept. of Treasury (1943), — C. C. A. —, 133 F. (2nd) 212.

The stipulated facts disclose a sufficient basis for imposing upon the appellee a tax measured by the gross income derived from the sales therein described. Whether the

appellee's incidental activities in another jurisdiction might subject him to additional tax liabilities there is not before us; but even that contingency would not relieve him from the obligation he now seeks to avoid.

Curry *v.* McCanless (1939), 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162.

O'Kane *v.* State, supra.

The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 40 [redacted] 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

Appeal from the Supreme Court of the State of Indiana

BRIEF FOR APPELLANT

Gath P. Freeman,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLANT

The Opinion Below

The opinion of the Supreme Court of Indiana is not yet officially reported, but is reported in 51 N. E. (2d) 6, also in the Record, pp. 30-35, and Appendix A in the Statement as to Jurisdiction, p. 29.

Jurisdiction

Paragraph 1 of Rule 12 of the Rules of this Court has been complied with, and probable jurisdiction noted by this Court on April 3, 1944.

Questions Presented

The question presented for decision in this case is:

Whether the Gross Income Tax Act of 1933 of the State of Indiana as applied to gross receipts derived from interstate commerce in intangibles, corporate stocks and bonds, by the barter, sale and delivery thereof by residents of Indiana to residents of other states of the United States, by and through the facilities of interstate communication by telegraph and United States mail and interstate shipment by United States mail, in the usual and customary manner and course of such sales through the New York Stock Exchange by residents of Indiana to residents of other states of the United States, lays an illegal burden on such commerce in conflict with Article I, Section 8 of the Federal Constitution.

The Statute Involved

The statute involved is the "Gross Income Tax Act of 1933", Ch. 50, Indiana Acts, 1933, p. 388; Burns Indiana Statutes Annotated 1933, Sec. 64-2601, et seq., as amended in 1937, Indiana Acts 1937, Ch. 117, p. 604, Burns Indiana Statutes Annotated 1943 Replacement, Sec. 64-2601 et seq.

Section 1 of the Act and Section 1 of the Act of 1937 amending the same provide that the Act may be cited as the "Gross Income Tax Act of 1933".

The pertinent provisions of the Act will be found in the Appendix A, infra, pp. 44-47.

Regulations

The pertinent regulations of the Gross Income Tax Division of Indiana are set forth in Appendix B, infra, pp. 48, 49.

Statement

The facts in the case were stipulated, except only a letter from appellant to appellee, Exhibit 1, and appellee's letter in reply, Exhibit 2, before suit, which stipulation of facts, Exhibit 3, and said two other exhibits were admitted in evidence at the trial. Judgment was rendered and entered in favor of the appellant[1] for the recovery of the tax paid by appellant under protest for the year 1940, with interest thereon as provided by law, and costs. (R. 9.)

The Gross Income Tax Act of 1933, as amended in 1937, was challenged by the appellant in both courts below as being repugnant to the Constitution of the United States, as applied to the receipts of the appellant from sales of his corporate stocks and bonds and deliveries thereof from his domicile or residence in Indiana in interstate commerce through the New York Stock Exchange to persons resident of other states of the United States, by means of interstate facilities consisting of telegraph and United States mail.

The complaint shows on its face that this is the only issue or ground alleged in the complaint for the recovery of the tax paid. (R. 2.)

The appellee joined issues thereon by his answer, (R. 7), and the case was submitted to the trial court on said stipulation of facts, Exhibit 3, and said letters which passed between the parties before suit, Exhibit 1 and Exhibit 2.

---

[1] Note: The said Gath P. Freeman, as Trustee aforesaid, was plaintiff in the trial court, appellee in the Supreme Court of Indiana, and is appellant in this appeal to the Supreme Court of the United States. The said Gilbert K. Hewit, as Director aforesaid, was defendant in the trial court, appellant in said State Supreme Court, and is appellee in this appeal.

In this brief (except quotations) "appellant" always refers to said Gath P. Freeman, as Trustee aforesaid, and "appellee" always refers to said Gilbert K. Hewit, as Director aforesaid.

There was no dispute of fact and the only issue in the case in either the trial court or the Supreme Court of Indiana was the question of law whether the application of the Gross Income Tax Act and the tax imposed thereby to the receipts of appellant from the interstate sales of his corporate stocks and bonds as alleged in his complaint and in the stipulation of facts was repugnant to Article I, Section 8 of the Constitution of the United States as constituting a regulation of and an illegal burden on interstate commerce.

The facts set forth in the stipulation and findings, so far as pertinent in this appeal, are summarized as follows:

Said Gath P. Freeman is and was at all times herein mentioned trustee under the will and of the estate of Henry C. Starr, deceased, late of Wayne County, Indiana, and was and now is domiciled in and a resident of Wayne Township in Wayne County, State of Indiana, and all matters, sales and transactions involved herein were matters, sales and transactions of said trust estate and were handled and performed by said trustee for the use and benefit and as the business of said trust estate, and said Gath P. Freeman at all times herein mentioned had and now has full and legal power and authority to act as such trustee; that neither said Gath P. Freeman, nor the estate of said Henry C. Starr, nor said Gath P. Freeman, as trustee aforesaid, had or has a place of business at any point other than at Richmond in Wayne Township, Wayne County, State of Indiana.

The situs of said trust estate and said corporate stocks and bonds sold by said trustee on behalf of said trust in the year 1940 was in said Wayne Township, Wayne County, Indiana. (Complaint, R. 2; Stipulation, R. 17.)

Said Gilbert K. Hewit was and is Director of Gross Income Tax Division, Department of Treasury of the State of Indiana, and was duly designated by the Governor of said state as such Director and as chief administrative officer charged with the administration and enforcement of the Indiana Gross Income Tax Act of 1933 and the Acts amendatory thereof and supplemental thereto. (R. 17, 18.)

In January, 1941, as required by law, the appellant filed a fiduciary gross income tax return with or in the office of the appellee for said trust for the year 1940 and paid the total amount of tax reflected on said return. In said return appellant included as taxable income an item of $65,214.20, constituting the aggregate gross receipts received by him from twenty separate sales of corporate stocks and bonds belonging to said trust sold in said year 1940, and the appellant paid the gross income tax thereon in the amount of $652.14 under protest. (R. 17, 18.) The property sold and the respective sales prices or gross receipts therefor are described and set forth in the complaint (R. 2, 3-4), and in the stipulation of facts (R. 17, 18-19).

All of said sales were handled in the usual and customary way of sales of intangibles through the New York Stock Exchange, and as further stipulated by the parties, the Court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. (R. 17, 21.)

All steps necessarily precedent to the institution of this action were taken by the appellant and appellee. (R. 17, 21.)

The sales were made in the following manner: The appellant placed orders to sell from time to time of the several stocks and bonds with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange. Said Sherman J. Brown was not a member of said New York Stock Exchange and could not himself make sales on said Exchange. (R. 17, 19-20.) (Opinion, R. 30, 31-32.)

At the time of placing said sales orders by the appellant with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the appellant knew and intended that the same would be communicated immediately by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New

York, and by them placed and offered on said New York Stock Exchange. (R. 17, 20.) (Opinion, R. 30, 32.)

Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds according to the sales orders of the appellant for sale on said New York Stock Exchange at the prices specified by the appellant in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana, over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the appellant of the sale and to deliver the stock certificates or bonds so sold. Thereupon the appellant delivered to said Sherman J. Brown in Richmond, Indiana, the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expense of sale, by United States mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the appellant less deduction of his broker's commission. (R. 17, 20.) (Opinion, R. 30, 32.)

Neither said Sherman J. Brown nor said Fenner and

Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said appellant upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as broker to procure sales thereof on or for commissions. (R. 17, 20-21.) (Opinion, R. 30, 32-33.)

All persons purchasing the intangibles so sold were non-residents of the State of Indiana; however, the appellant at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the appellant make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana. (R. 17, 21.) (Opinion, R. 30, 33.)

The judgment of the trial court in favor of appellant for the recovery of the tax paid with interest and costs (R. 9, 10) was reversed by the Supreme Court of Indiana with directions to sustain appellee's motion for a new trial and to enter judgment for the appellee. (R. 30, 35.)

Under said decision of the Supreme Court of Indiana and its construction of the Gross Income Tax Act of 1933 the tax imposed thereby is applicable to said gross receipts of appellant from such interstate sales of his corporate stocks and bonds.

Specification of Errors to be Urged

The errors of the court below will be urged as set forth in appellant's Assignment of Errors (R. 39, 40, 41) and may be summarized as follows:

That the Supreme Court of Indiana erred in holding that the Gross Income Tax Act of 1933 is valid as applied to gross receipts of appellant derived from sales of his corporate stocks and bonds conducted in interstate commerce, and in holding that the tax imposed by said Act on such gross receipts is not invalid as constituting an illegal burden on such commerce in conflict with Article I, Section 8 of the Constitution of the United States.

SUMMARY OF ARGUMENT

1

Burden on Interstate Commerce

The Indiana Gross Income Tax Act of 1933 as construed and applied by the Supreme Court of Indiana in this case (R. 30-35; 51 N. E. (2d) 6) imposes a tax upon the entire proceeds or gross receipts from sales by the appellant and all persons, including trustees of trust estates, fiduciaries and corporations, domiciled in or resident of the state, of intangibles, stocks and bonds, including proceeds or gross receipts from the same sold and delivered in interstate commerce to residents of other states. The rate of tax is one (1%) per cent of the gross receipts, payable quarterly. This tax is in addition to all ad valorem property taxes and other excise taxes. The gross income tax laid upon gross receipts from interstate commerce amounts to and is a regulation of and direct burden upon such commerce in conflict with and repugnant to

Article I, Section 8 of the Federal Constitution. It is immaterial what the nature of the tax is, since the result is the same, whether the tax is laid on the privilege of selling or doing business, or the right to receive gross income, or the privilege of domicile, or upon gross receipts as such, or other basis or pretext. The effect is to impose a tax upon the privilege of engaging in interstate commerce, which is tantamount to a tax upon the commerce itself, contrary to and in conflict with the commerce clause of the Constitution.

The invalidity and unconstitutionality of the Gross Income Tax Act of Indiana has been settled and adjudicated by this Court in the case of

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 58 Sup. Ct. 913,

so far as interstate and foreign commerce in manufactured goods or commodities are concerned, this Court holding therein that said tax was a regulation of and a direct burden upon such commerce in conflict with the commerce clause of the Federal Constitution and therefore unconstitutional and void as to such commerce.

Under the decision of the Adams case the State is not privileged to levy or collect the tax imposed by the Act on gross receipts derived from sales in interstate or foreign commerce.

The Supreme Court of Indiana cites the Adams case with approval, but construes the decision as applying to tangible property only, and does not follow it in this case. (R. 30, 34.)

The only question, therefore, in issue in this case is whether intangibles, stocks and bonds, are proper subjects of commerce and whether interstate sales and deliveries

thereof are transactions in commerce among the several states within the meaning of the commerce clause of the Federal Constitution.

2

Intangibles Are Subjects of Commerce, and Interstate Sales Thereof Constitute Interstate Commerce

The appellant contends that intangibles, corporate stocks and bonds, are subjects of commerce and that interstate sales and deliveries thereof to residents of other states constitute commerce among the several states protected against state taxation by the commerce clause of the Constitution of the United States, for the same reason and to the same extent as such sales and deliveries of tangible property. There is no inherent difference between sales of intangible property and sales of tangible property so far as interstate commerce is concerned or the taxing thereof by the several states. When intangibles are bartered and sold and delivered and thereby handled and treated by the parties as subjects or articles of commerce, they are subjects of commerce, and such interstate transactions therein constitute interstate commerce within the meaning of the Federal Constitution.

Oklahoma-Texas Trust v. Securities and Exchange Commission (1939), 100 Fed. (2d) 888, 889;

Electric Bond & Share Co. et al. v. Securities and Exchange Commission et al. (1937), 92 Fed. (2d) 580. (See opinion (15) and (17), pp. 589-590.) Affirmed by U. S. Supreme Court, 303 U. S. 419, 58 Sup. Ct. 678;

General Motors Acceptance Corp. v. Huron Finance Corp. et al. (1935), 262 N. W. 195;

And other cases cited in Argument, infra, pp. 33, 34.

ARGUMENT

The Basis of the State Court's Decision

In its opinion the State Court lays four premises, presumably as foundation for its decision in this case:

1. That there is a misconception that the Federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce; and that the immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government, but rather a protection against such commerce being subjected to the onerous burdens of multiple exactions. (R. 30, 33-34.)

   But, the appellant submits, the Indiana Gross Income Tax Act does impose an onerous tax burden and a danger and vice of multiple exactions on sales of intangibles in like manner and to the same extent as on sales of tangible property, as held with respect to sales of tangible property by the Supreme Court of the United States in the Adams case.

2. That as to sales of tangible property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller, and that by adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected. (R. 30, 34.)

   But, the appellant submits, the conclusion and decision of the State Court is to the contrary in

this case, the absolute and direct opposite of the Court's proposition or premise, the Court holding that where the interstate sales are of intangibles, as in this case, the state of the seller is privileged to tax. The appellant respectfully submits that the logic or reasoning of the State Court in this respect is fallacious, and that the decision of the Court could not in reason be based on that premise. The appellant is forced to the conclusion that the State Court must have been of the opinion, although not expressed, that intangibles were not subjects of commerce within the meaning of the commerce clause, which was the theory of the appellee at the trial and on appeal in the State Court.

3. That as to sales of tangible property in interstate commerce the Indiana Gross Income Tax Act is unconstitutional and not applicable. (R. 30, 34.)

But, the appellant submits, there is no inherent difference in sales interstate of tangible or intangible property so far as the commerce clause of the Constitution is concerned and the taxation of such commerce by the several states. If intangibles are subjects of commerce, which they undoubtedly are, the sales thereof interstate are entitled to the protection of the commerce clause to the same extent as sales of tangible property.

4. The only other premise laid by the State Court as foundation for its decision was to the effect that the situs of intangible property, such as stocks and bonds, is not of a transitory character, and that the rule of "mobilia sequuntur personam"—"the situs of the property is the domicile of the

owner"—applies thereto (R. 30, 34-35); from which the Court reasoned that if the situs of appellant's securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers and that the activities of appellant's agents in making the sales did not change the situs of his securities any more than they affected his domicile, and that it was immaterial that "said activities incidentally involved interstate commerce." (R. 30, 35.)

But, the appellant respectfully submits, the matter of situs is material in this case only for the purpose of establishing the interstate character of the sales. The appellant alleged in his complaint that the situs of the securities before sale thereof was in Wayne Township, Wayne County, Indiana (R. 2), and naturally the situs remained there until the sales were consummated by deliveries made in New York pursuant to the intent of the parties and the rules of the New York Stock Exchange. How does the matter of situs affect the question, except to prove that the sales were interstate sales? In case of sale the situs of any personal property, either tangible or intangible, for all purposes of taxation changes from seller to buyer at the point of delivery, which delivery point is fixed by agreement or intent of the parties, or by the New York Stock Exchange as to sales of securities thereon.

* * * * * * * *

The appellant discusses these propositions or premises of the State Court chronologically as follows:

1

As To Sales of Property in Interstate Commerce the Gross Income Tax Act of 1933 of the State of Indiana Cannot Constitutionally Be Enforced

As above indicated the law is well settled that the Gross Income Tax Act of 1933 of the State of Indiana is unconstitutional and void as to receipts from sales interstate of commodities by residents of Indiana to residents of other states of the United States, for the reason that such a state tax is a regulation of and an illegal burden upon interstate commerce prohibited by and repugnant to Article I, Section 8, of the Constitution of the United States.

J. D. Adams Mfg. Co. v. Storen etc., supra (1938), 304 U. S. 307, 58 Sup. Ct. 913.

The Adams case was decisive of the question whether sales of commodities or tangible property in interstate commerce were subject to taxation under the Gross Income Tax Act of Indiana, the judgment of the Supreme Court of the United States therein being that they were not.

The decision in the Adams case is in accord with a long and unbroken line of decisions involving similar state taxes.

Gwin, White & Prince, Inc., v. Henneford, et al. (1938), 305 U. S. 434, 59 Sup. Ct. 325;

Allied Mills, Inc., v. Department of Treasury (1943), 63 Sup. Ct. 666, affirming —— Ind. ——, 42 N. E. (2d) 34 (1942);

Galveston H. & S. A. Ry. Co. v. Texas (1907), 210 U. S. 217, 28 Sup. Ct. 638;

Crew Levick Co. v. Commonwealth of Pennsylvania (1917), 245 U. S. 292, 38 Sup. Ct. 126;

Stockard v. Morgan (1901), 185 U. S. 27, 22 Sup. Ct. 576;

In re Globe Varnish Co. (1940), 114 Fed. (2d) 916, affirmed 312 U. S. 690;

Postal Telegraph Cable Co. v. Adams (1895), 155 U. S. 688, 695, 15 Sup. Ct. 268;

State Freight Tax (1872), 15 Wall. 232, 277 (21 L. Ed. 146).

And the Adams case has not been modified or overruled but on the contrary has been cited with approval in the very recent Indiana case decided May 15, 1944, of

International Harvester Co. v. Department of Treasury, etc., 64 Sup. Ct. 1019, 1021.

The Supreme Court of the United States concluded and held in the Adams case that the tax was what it purported to be—a tax upon gross receipts from commerce—and as applied to sales interstate was a regulation of and a direct burden upon interstate commerce prohibited by Article I, Section 8, of the Constitution.

The appellant assumes, therefore, that it is not necessary to review the subject in general by way of support of the Adams decision, which stands as the settled and established law with respect to the Indiana gross income tax concerning sales interstate by residents of Indiana of commodities or tangible property, and, as the appellant contends, of any property which is the subject of commerce, including intangibles such as the corporate stocks and bonds of the appellant by him sold and delivered to residents of other states by and through the facilities of interstate commerce.

2

The State of the Buyer, But Not That of the Seller, Is Privileged to Tax

In its opinion in this case the State Supreme Court discussed with approval the doctrine that such a tax may be levied by the state of the buyer, but not by that of the seller. But the Court did not apply that theory in this case. In support of this formula the Court cited the case of Department of Treasury v. Allied Mills, Inc. (1942), an Indiana case, 42 N. E. (2d) 34, supra, affirmed by the Supreme Court of the United States, 318 U. S. 740, 63 Sup. Ct. 666, and the J. D. Adams Mfg. Co. v. Storen case, supra, 304 U. S. 307, 58 Sup. Ct. 913. (R. 34.)

After laying the major premise to the effect that "the Supreme Court of the United States has held that as to transactions relating to such property (tangible property) a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller," (R. 34), the State Court failed to continue the syllogism by laying the second or minor premise logically and obviously warranted by the undisputed evidence, the stipulation of facts (R. 17), to the effect that this appellant is the seller domiciled in Indiana, the situs of his intangibles before sale, and the Court failed to draw the logical and inevitable conclusion therefrom, which, the appellant respectfully submits, should have been to the effect, therefore, that the State of Indiana was not privileged to tax the receipts of the appellant derived from such interstate commerce.

It is impossible to understand why the State Court discussed that view or rule with obvious approval unless the Court believed it pertinent and applicable to this case. And if the Court did consider it applicable, as apparently it

did, the appellant respectfully submits that the Court should have followed through the logical sequence of reasoning and should have pronounced its finding, conclusion and decision accordingly.

The language used by the State Court in this connection was as follows:

> "Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller."

the Court citing the Allied Mills case and the Adams case in support thereof, as above stated. (R. 34.)

As in the case at bar, the matter of situs did not enter into the questions presented for decision in those cases, the facts as to situs having been undisputed or stipulated by the parties and having been admitted in evidence for the purpose merely of showing the interstate character of the sales and which state was that of the seller.

In this case it was conceded that the situs of appellant's intangibles before sale was in Wayne County, Indiana, the domicile of the appellant and the state of the seller, and that the sales and deliveries were made through the New York Stock Exchange in the usual and customary way to persons who were residents of other states of the United States, according to the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing the same. (Stipulation, R. 17, 21; Opinion, R. 30-35.)

In support of this rule announced by the State Court in this case, we cite the case of

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33, 60 Sup. Ct. 388, 394, 398,

involving the New York City retail sales tax imposed upon purchasers for consumption of tangible personal property generally, with certain exceptions, and utility services in supplying gas, electricity, telephone service etc., in which case, the Supreme Court of the United States, in upholding the tax upon sales of coal from Pennsylvania to New York City as a tax "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption", said:

> "This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods—effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, (Citing cases) and when the extra-state seller has shipped them into the taxing state for sale there." (Citing cases.) (Page 394 of 60 Sup. Ct.)

and in discussing and distinguishing the Adams case the Court said:

> "In Adams Manufacturing Co. v. Storen, supra, 304 U. S. pages 311, 312, 58 S. Ct. pages 915, 916,—a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. * * * (Citing cases.)

"The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax. * * *" (Page 398 of 60 Sup. Ct.)

In commenting upon this subject in 36 Illinois Law Review, pages 727-746 (March 1942, at pages 738, 739), the author said:

"But the true meaning of the Berwind-White case is obscure. There would appear to be at least three possible interpretations that might be placed on the decision: 1. The court really is adhering to the principles laid down in the cases of 1938 and is assuming that in some way the danger of cumulative burdens will actually be avoided, but failed in its opinion to say how. * * * (The cases of 1938 referred to are, in the order of their decision, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 Sup. Ct. 546, the J. D. Adams Mfg. Co. case, supra, and Gwin, White & Prince, Inc., v. Henneford, supra.) * * * It can not be through the method suggested in the Adams and Gwin cases, viz., apportionment, since the New York tax was upheld without apportionment. There seems to be only one other way out * * * viz., the buyer's state (New York) can tax an interstate sale in full; the seller's state (Pennsylvania) cannot tax the same transaction at all. This theory would relieve interstate commerce from the danger of cumulative burdens while at the same time requiring it to pay its way, although it involves a more or less arbitrary choice between the two states. * * * This interpretation of the Berwind-White case appears to have been adopted by the Circuit Court of Appeals for the Seventh Circuit in a recent case." In re Globe Varnish Co., 114 F. (2) 916, 312 U. S. 690, supra.

The decision of the J. D. Adams Mfg. Co. case is in full accord with the decisions hereinabove mentioned, which decision is the law so far as the Indiana Gross Income Tax

Act and sales in interstate commerce by residents of Indiana to residents of other states are concerned.

* * * * * * *

The only case which seems to be at variance with the decisions above cited and discussed in connection with this subject is that of

O'Kane v. State (1940), 283 N. Y. 439, 28 N. E. (2d) 905,

cited by the State Court (R. 34), but not on this subject. That case involved a stamp tax upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares * * * whether made upon or shown by the books of the — corporation * * *." By a four to three decision of the Court of Appeals of New York it was held that the State of New York, the state of the seller, could constitutionally impose and collect said stamp tax and that no discrimination was practiced on interstate commerce by the imposition thereof, on the event of making of agreement for sale which occurred in New York, where the stock was located, prior to the transportation of the stock in interstate commerce.

While the O'Kane case involved sales of intangibles, that was in no sense an issue in the case or any basis on which the decision rested. The court made no distinction between sales of intangible or tangible property, apparently the parties had raised no such question, and the decision does not rest on any distinction between the two kinds of personal property.

The unanimous opinion of the court held that the sales interstate of such intangibles constituted interstate commerce. But the majority of the court, while approving the decision of the Berwind-White case and the principles

upon which it rested, reasoned and took the view that if the tax in the Berwind-White case was valid as a tax on a local taxable event, delivery of coal, in the state of the buyer, after interstate commerce had ended, the tax in the O'Kane case was likewise valid as a tax on a local taxable event in the state of the seller, consisting of the making of the agreement for the sale of the property, in the state of the seller, prior to the transportation of the property in interstate commerce. The entire court found that the agreement of sale was made in New York, where the property was located before sale, the state of the seller, and the majority of the court held that the making of the agreement of sale in the state of the seller before transportation in interstate commerce, although the sale had been negotiated by interstate telephone, telegraph and United States mail, was as much an incident of ownership and as much a taxable event as the delivery of the coal in the Berwind-White case in the state of the buyer after interstate commerce had ended. In basing its decision on that proposition the majority of the court used the following language:

> "In the case at bar certain goods, to-wit, shares of stock, were located in this State and were part of the common mass of property which undoubtedly was subject to taxation. The taxable event, to-wit, the making of the agreement for the sale of the property, occurred in this State prior to the transportation of the goods in interstate commerce, and was an exercise of one of the incidents of ownership. In imposing a tax on the exercise of one of the incidents of ownership, no discrimination was practiced on interstate commerce. Appellants object to the taxation of a local event because it is followed by interstate commerce. But unless local events occurring after interstate commerce has ended are clothed with a greater sanctity than are possessed by local events preceding interstate com-

merce, such objection must fail. McGoldrick v. Berwind White Coal Mining Co., supra." (28 N. E. (2d) at page 909.)

The court by majority decision rejected or misconstrued the principles and decisions of J. D. Adams Mfg. Co. v. Storen, supra, 304 U. S. 307, 58 Sup. Ct. 913, and Gwin, White & Prince, Inc., v. Henneford, supra, 305 U. S. 434, 59 Sup. Ct. 325, the court saying:

> "In cases such as Gwin, White & Prince, Inc., v. Henneford — and Adams Mfg. Co. v. Storen — the taxes there in question were held invalid because the taxable event was equally within the jurisdiction of States other than the one of origin and the one of destination, and hence the same event could have been taxed in each State through which the shipment passed if the levy had been sustained. But in the case at bar it may be said truly, as was said in McGoldrick v. Berwind-White Coal Mining Co., 'the present tax as applied to respondent is without the possibility of such consequences.' 309 U. S. at page 48, 60 S. Ct. at page 393 —. In the circumstances of the case at bar, as has been said, the taxable event is the making in this State of a contract to sell goods which are in this State. The event is no more recurrent than the taxable event in Berwind-White, and hence the possibility of cumulative taxes is equally absent." — (28 N. E. (2d) at page 909.)

The appellant does not understand that the decision in the case of J. D. Adams Mfg. Co. v. Storen was based on the proposition above stated in the majority opinion of the O'Kane case, but that the decision in the Adams case was really based on the findings of the Supreme Court of the United States as follows:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activ-

ities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution." (58 Sup. Ct. at page 916.)

"It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate." (58 Sup. Ct. at page 917.)

And in the case of Gwin, White & Prince, Inc., v. Henneford, supra, involving a tax of the State of Washington for the act or privilege of engaging in business activities, in the amount of ½ of 1% of the gross income of the business, the decision of the Supreme Court of the United States was based on the findings and opinion of the Court as follows:

"While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce — so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire inter-

state commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume. * * *

"But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state (Citing cases) burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject. * * *

"If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation, discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. (Citing the Adams case and others.) * * *

"Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." (59 Sup. Ct. at pages 327, 328.)

Therefore, the appellant respectfully submits that the majority opinion of the Court of Appeals of New York in the O'Kane case misinterpreted the reasoning and misconstrued the force of the decisions of the Supreme Court of the United States in the cases of J. D. Adams Mfg. Co. v. Storen and Gwin, White & Prince, Inc., and that the decision in that case is contrary to precedent and the established law.

We discuss the O'Kane case at length because the Supreme Court of Indiana in this case cites the O'Kane case and purports to rely upon it (R. 34), although it does not appear from the opinion that the Court in anywise bases its decision on that case. Nor does it appear that the Court bases its decision on the Adams case. In fact, the appellant is at a loss to determine the basis of the decision, as it does not seem to be disclosed in the opinion, unless it can be justly concluded from the opinion that intangibles are not subjects of commerce, which was the theory of the appellee, as hereinafter shown.

To the appellant it appears that the dissenting opinion in the O'Kane case of Chief Judge Lehman, with Judge Loughran and Judge Conway concurring, in holding invalid the stamp tax there involved, is a more logical and better considered opinion than the majority opinion of the Court in that it recognized the rationale and gave effect to the decisions of the Supreme Court of the United States in said cases of J. D. Adams Mfg. Co. v. Storen, supra, and Gwin, White & Prince, Inc., v. Henneford, supra. We quote from the minority opinion as follows:

> "The plaintiff challenged the validity of the Tax Law of the State of New York — in so far as it purports to impose a tax upon the sale or transfer of the stock which the plaintiffs have sold and delivered

to persons outside of the State of New York, on the ground that such a tax constitutes an unlawful burden on interstate commerce.

"The sellers reside in New York and, unquestionably, the State would have power to tax their personal property here, including property which the plaintiffs intend to use in interstate commerce, until the moment when such property becomes part of a movement in interstate commerce. The purchasers live in other jurisdictions and, unquestionably, such jurisdictions would have power to tax their property immediately after it was delivered in the course of interstate commerce to the purchasers. The Tax Law of New York State, which is challenged, does not, however, attempt to tax the property of the plaintiffs or any exercise of power over such property by them, except in connection with a sale in interstate commerce.

"Every transaction in interstate commerce requires the performance of acts in two or more states. Here the contract was made by telephone, telegraph and mail, with the messages originating in one state and received in another state, and the contract of sale became effective only upon exchange of confirmation by the buyer outside of the State and the seller here. The shares of stock were mailed here, passed through other states to the cities where the purchasers did business. Payment was made there and transmitted to the sellers here. Authority of the State, if any, to tax the sale or transfer of the stock must rest upon the fact that the sellers lived here and the State had jurisdiction of the property before it entered into the stream of interstate commerce, or upon the fact that part of the transaction in interstate commerce occurred here.

"If the State of New York had power to tax the sale or transfer of this property on such grounds, then it would seem clear that Pennsylvania and the District of Columbia would each have the right to tax the

sale or transfer of such securities because the purchaser resides and the transfer is made there. But in such case 'interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.' Adams Manufacturing Co. v. Storen, 304 U. S. 307, 311, 58 S. Ct. 913, 916—Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325 —. It is said that there is no proof here that, in fact, Pennsylvania or the District of Columbia do impose any tax upon the transfer of the stock outside of this State or that, in this case, the sales have, in fact, been subjected to a tax burden greater than similar sales where purchaser and seller both live in the State of New York and transfer is made there. It is established by a long line of cases, referred to and approved in the two cases cited above, that interstate commerce may not be subjected to the risk of double taxation — whether, in fact, two or more States have joined in imposing multiple taxes is immaterial if the risk of multiple taxation exists. So, in Adams Manufacturing Co. v. Storen, supra, the Supreme Court of the United States declared invalid a State tax on gross income derived by a manufacturer from sales in interstate commerce, saying that the tax 'is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured.' 304 U. S. at page 311, 58 S. Ct. at page 916 —. I can find no distinction in principle between the tax there declared invalid and the tax which is here challenged. To sustain this tax we must reject the authority of what was so recently said and decided by the Supreme Court of the United States.

"The State, however, relies for authority to a great extent upon the later case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388—. It may hardly be supposed that the majority of the court intended in that case to destroy the force of

its previous decisions without even mentioning the decisions which it intended to overrule or weaken. In the last case the opinion by Mr. Justice Stone indicates clearly the factors which induced the court to sustain the tax in that case, though it was a tax on a sale in interstate commerce." (28 N. E. (2d) at pages 910, 911.)

"Here the tax is imposed upon the seller and not the buyer and it has no possible analogy to a 'use' tax or a property tax on goods at their destination. If this tax is sustained, then similar sales in interstate commerce may be subjected to the risk of a burden of multiple taxation which might impede or destroy such commerce, and similar taxes have been declared a violation of the Constitution whenever challenged. — Here the State has attempted to subject a sale in interstate commerce to the same single tax which must be paid on other sales and other states would have power, at least as good, to impose similar sales tax upon the same sale." (28 N. E. (2d) at page 912.)

* * * * * * *

That intangibles such as corporate stocks and bonds are subjects of commerce and interstate commerce is too well established for any serious doubt, which is supported by O'Kane v. State, supra, and by discussion and authorities following.

And, therefore, the rule announced by the State Court in this case applies as well to sales of intangibles in interstate commerce as to sales of tangible property.

The state of the seller is no more privileged to tax interstate sales of intangible property than it is to tax such sales of tangible property.

As To Sales of All Property, Both Tangible and Intangible, Which Are Subjects of Commerce and Sold in Interstate Commerce, the Gross Income Tax Act of 1933 of the State of Indiana Is Unconstitutional and Void

The State Supreme Court put a limited construction on the decision of the J. D. Adams Mfg. Co. v. Storen case, confining its effect to "tangible property" (R. 34), and so did the appellee under his theory of defense at the trial of this cause and on appeal to the State Court that the intangibles of appellant, his corporate stocks and bonds sold in interstate commerce, were not proper subjects of commerce or interstate commerce and that the commerce clause of the Federal Constitution and the decisions construing the same, the Adams case in particular, were not applicable to sales interstate of such intangibles.

To show that this was the theory of defense of the appellee and his theory on appeal to the State Court, we quote the following excerpts from his brief in said Court:

> "The issues were formed by the filing of an Answer in Denial — to plaintiff's Complaint —. The contentions of the parties were briefly as follows:
>
> "The appellee (appellant here) contended that the amounts received by him and covered by the evidence constituted gross income derived from business conducted in commerce between the State of Indiana and other States of the United States to such an extent that the State of Indiana is prohibited from taxing such income by Section 8, Article I of the Constitution of the United States of America.
>
> "The appellant (appellee here) contended that the transactions reflected by the evidence did not constitute that type of commerce which the State of In-

diana is prohibited from taxing under the provisions of the Commerce Clause of the Federal Constitution." (R. 24.)

Also:

"Stock certificates and bonds are documents which are evidences of the number of shares of stock which the holder of them owns or the amount of money due a lender and do not in themselves constitute choses of action or property." (R. 26.)

Also:

"The Prohibition of the Commerce Clause on Taxing Income from Tangible Property Does Not Apply to the Tax on Income When Intangibles Are Involved." (R. 28.)

Also:

"No constitutional objection can be successfully made against the taxation of the resident trustee involved here, measured by the gross receipts from his sales of intangibles — his sales of rights, the legal situs of which follow his person like the residence of an infant child follows that of his parents. An intangible right is incapable of shipment in interstate commerce, therefore, the ADAMS case and other cases of the same type involving shipments of corporeal objects in the channels of interstate trade can have no practical application here." (R. 29, 30.)

While the State Supreme Court did not expressly find that the intangibles involved were not proper subjects of commerce to which the commerce clause and the decisions construing the same apply, it would seem that the Court must have been of that opinion, as the decision in this case can hardly be justified on any other ground. Certainly no valid ground appears in the opinion on which to

base the decision, and since that was the theory of appellee's defense at the trial and on appeal in the State Court, it would seem that that was the basis of the decision, although not expressed in the Court's opinion.

The Constitution does not define the word "commerce," but as applied to trade it has been defined as the exchange of goods or property of any kind for money or for other goods or property.

Schill v. Remington Putnam Book Co. (1941), 17 A. (2d) 175.

The Gross Income Tax Act of 1933 of the State of Indiana (Appendix A, infra, pp. 44-47, and the regulations promulgated pursuant thereto (Appendix B, infra, pp. 48, 49) define, include and treat intangibles, including corporate stocks and bonds, as subjects of commerce and interstate commerce and impose the tax on all receipts or gross income from sales thereof, both intrastate and interstate, to the same extent and in like manner as from sales of tangible property, and the appellee as taxing official demands and collects the tax on sales of such intangibles, both intrastate and interstate sales, while at the same time asserting and contending that such intangibles are not subjects of commerce and barter, sale and delivery within the meaning of the commerce clause.

If intangibles are not subjects of commerce or interstate commerce within the meaning of the commerce clause, then in such case they are not subject to barter and sale intrastate, and there could be no sales thereof intrastate which would be subject to the tax imposed by the Act. If intangibles cannot be sold and delivered within the meaning of the commerce clause, they cannot be sold and delivered within the meaning of the Gross Income Tax Act of Indiana, and while the Act by its language embraces and

includes sales of intangibles, corporate stocks and bonds, the Act would be ineffective and no tax could be collected in said respect, since the Act imposes the tax on gross receipts from sales. The appellee would hardly contend that intangibles are not subjects of intrastate commerce, barter and sale intrastate, and yet he takes the anomalous position that they are not subjects of interstate commerce.

If the property sold is a proper subject of commerce, its sale and delivery across state lines is interstate commerce to which the decision of the Adams case would be applicable and controlling.

Intangibles Are Subjects of Commerce and Interstate Commerce

The appellant contends that such intangibles, corporate stocks and bonds, are as much the subject of commerce as are commodities or any other form of personal property, and that sales thereof across state lines by a resident of Indiana to residents of other states are no more subject to or liable for the gross income tax of Indiana than are sales of commodities or other forms of personal property.

This proposition is supported by many well considered cases, and we find no authority to the contrary.

Oklahoma-Texas Trust v. Securities and Exchange Commission (1939), 100 Fed. (2d) 888;

Parey v. Bache (1942), 125 Fed. (2d) 493;

General Motors Acceptance Corporation v. Huron Finance Corp. et al. (1935), 262 N. W. 195;

Electric Bond & Share Co. et al. v. Securities and Exchange Commission et al. (1937), 92 Fed. (2d) 580. (See opinion (15) and (17) pp. 589-590.) Affirmed by U. S. Supreme Court, 303 U. S. 419, 58 Sup. Ct. 678;

Bracey v. Darst (D. C.) (1914), 218 Fed. 482;
Industrial Acceptance Corp. v. Haering (1929), 253 Ill. App. 97;
Jones v. Securities and Exchange Commission (1935), 79 Fed. (2d) 617. (See opinion (4-6) p. 619);
Charles F. Champion v. Ames, U. S. Marshall (1903), 23 Sup. Ct. 321;
O'Kane v. State (1940), 28 N. E. (2d) 905;
Securities and Exchange Commission v. Torr (1936), 15 F. Supp. 315;
Securities and Exchange Commission v. Bailey (1941), 41 F. Supp. 647;
Securities and Exchange Commission v. Payne (1940), 35 F. Supp. 873;
Securities and Exchange Commission v. Tung Corp. (1940), 32 F. Supp. 371.

In this connection we quote from the case of Oklahoma-Texas Trust v. Securities and Exchange Commission (1939), 100 Fed. (2d) 888, 890, supra, in which the court in part said:

"The Trust contends that the Securities Act is unconstitutional for the reason that the transportation and sale of securities is not interstate commerce.

"In the Lottery Cases, 188 U. S. 321, 345, 23 S. Ct. 321, 322, 47 L. Ed. 492, the Supreme Court said:

'What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce.'

"While securities are mere evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate, trust, and other property and are mere choses in action, nevertheless in modern commercial intercourse they are sold, purchased, delivered, and dealt with the same as tangible commodities and other ordinary articles of commerce. The mails and the facilities of interstate commerce are commonly used to effectuate their sale and transfer and we have no doubt that they should be regarded as subjects of interstate commerce and transportation." (100 Fed. (2d) at page 890.)

And in the case of Electric Bond & Share Co. et al. v. Securities and Exchange Commission et al. (1937), 92 Fed. (2d) 580, supra, the Circuit Court of Appeals, Second Circuit, on page 589 said:

"The suggestion that the power of the Federal government over interstate commerce is limited to the regulation of trade in or the movement of tangible commodities which are the subject of barter and sale has been repudiated." Citing cases.

"If Congress has the power to compel a holding company to register when it makes a public offering of securities through the mail or interstate channels, it also has the power to compel a holding company to register if it sells a security having reason to believe that such security by use of the mails or other means or instrumentality of interstate commerce will be distributed or made the subject of a public offering. The registration requirements here are similar to the requirements for registration of securities under the Securities Act of 1933 as amended in 1934 * * *." (Page 590.) (Affirmed by the Supreme Court, 303 U. S. 419 (1938).)

In the case of Jones v. Securities and Exchange Commission, 79 Fed. (2d) 617, supra, (1935), the Circuit Court

of Appeals, Second Circuit, in its opinion aptly said: (Opinion (4-6) p. 619.)

> "The appellant contends that the Securities Act of 1933 as amended is unconstitutional because the securities are not subjects of commerce. But the power of Congress as it relates to control over the use of the mails is fully sustained by the cases which have considered the mail fraud statutes." (Citing cases.)

The case of General Motors Acceptance Corporation v. Huron Finance Corporation et al. (1935), 262 N. W. 195, supra, is also squarely in point, involving sales of conditional sale notes across state lines and suit in the buyer's state for possession of the automobile covered by the notes, the Supreme Court of South Dakota in its opinion saying: (Opinion, p. 200.)

> "Respondent contends that the appellant was not engaged in interstate commerce because of the fact that notes and contracts per se are incapable of becoming articles of interstate commerce. We are not impressed with that contention as being a sound rule of law. We will, however, admit that under a certain statement of facts, as shown by some of the decisions, such is the case, but in those instances the contracts were not dealt with by the parties as articles of interstate commerce. The law seems to be quite well settled and established that stocks and bonds are proper subjects of interstate commerce and that the transaction of such articles of personal property from one state to another for the purpose of barter and sale and delivery constitutes not only commerce among the states of this country, but constitutes a *VERY LARGE AND IMPORTANT ELEMENT OF SUCH COMMERCE.*" (Our italics.) Citing cases.

In the case of Bracey v. Darst (D. C.), (1914), 218 Fed. 482, supra, involving the constitutionality of the "Blue Sky

Law" of West Virginia, the court succinctly said (Opinion, p. 495):

> "We do not think it can be longer questioned that stocks, bonds, debentures, and other securities are subject-matters of interstate commerce." Citing cases.

In the case of Industrial Acceptance Corporation v. Haering (1929), 253 Ill. App. 97, supra, the facts being similar to those in the General Motors Acceptance Corporation case, supra, the court held that the purchase of notes and contracts by a finance corporation from a resident of another state constituted an interstate commerce transaction.

The famous lottery cases are expressive of the law on this subject, and the opinion of the United States Supreme Court in the case of Champion v. Ames, United States Marshall (1903), 23 Sup. Ct. 321, supra, is eloquent on the question of lottery tickets being subjects of commerce and the power of the Federal Government to control the sale thereof and traffic therein in interstate commerce. The following excerpts are quoted from the opinion of the court:

> "What is the import of the word 'commerce' as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carrier of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of certain amount of money therein specified, also constitute commerce among the states?" (Page 322.)

After quoting from the opinion of Chief Justice Mar-

shall in the leading case of Gibbons v. Ogden, the court said:

> "The principles announced in Gibbons v. Ogden were reaffirmed in Brown v. Maryland. * * * After expressing doubt whether any of the evils proceeding from the feebleness of the Federal government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: 'It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states.' Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several states, the court reaffirmed the doctrine that the power was 'complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. * * * Commerce is intercourse; one of its most ordinary ingredients is traffic.'" (Pages 323-324.)

And the court further said:

> "It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks of the United States to be applied by the agents representing the lottery company to the prompt payment of the prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that

the company would pay to him the amount of the prize drawn. * * * Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. * * * We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states." (Page 326.)

And the court further said:

"In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution." (Page 327.)

In the case of Parey v. Bache et al. (1942), 125 Fed. (2d) 493, supra, it was squarely held by the Circuit Court of Appeals, Fifth Circuit, that where a resident of Florida purchased listed stocks through the Miami, Florida, office of New York brokers, the purchases and sales of stock were purchases and sales of stock in interstate commerce.

And in the case of O'Kane v. State (1940), 28 N. E. (2d) 905, supra, the Court of Appeals of New York held that the negotiating of sales by interstate communication and the mailing of corporate stock certificates from New York to Philadelphia and to Washington, D. C., from seller to buyers, was interstate commerce.

The same is true as to traffic interstate in other forms of intangible property, according to cases hereinabove cited.

Therefore, the appellant respectfully submits, that the corporate stocks and bonds of appellant were proper subjects of commerce and that his sales thereof interstate constituted interstate commerce entitled to the protection of the commerce clause of the Federal Constitution.

4

Situs and the Rule of "Mobilia Sequuntur Personam"

The State Court discusses at considerable length the subject of situs and the rule of "mobilia sequuntur personam" (R. 34, 35), as did also the appellee in the State Court and at the trial (R. 24-30), but it is respectfully submitted that this represents no basis or ground for the decision of the State Court against the appellant here. The matter of situs and the said rule were not in issue in any sense.

It was alleged in the complaint (R. 2) and in the stipulation of facts (R. 17) that the domicile of appellant and the situs of his stocks and bonds at all times before said sales was in Wayne County, Indiana, and that the sales thereof were made and effected through the facilities of interstate commerce from the City of Richmond in said county and state through the New York Stock Exchange to residents of other states, as particularly described and set forth in said complaint and stipulation of facts. The matter of situs was conceded by both parties and there was no dispute as to said rule. The Indiana situs of appellant's stocks and bonds was alleged in his complaint to show the interstate character of his sales thereof, and for no other purpose, and the matter of situs and the rule mentioned have no other significance or importance in this case.

This being a case of interstate sales of corporate stocks and bonds, the cases cited by the State Court in support

of that rule (R. 34, 35) are not at all in point. Regardless of the established rules of taxation of personal property, that tangible property is taxed where it is found or located and intangible property at the domicile of its owner, and even in two jurisdictions under certain conditions, such rules do not affect sales or transactions in interstate commerce, except only as bearing on or as proof of sales and deliveries of property from one state to another or to foreign countries.

In discussing the subject of situs and the rule of "mobilia sequuntur personam" the State Court in its opinion in part said: "If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers" (R. 35); from which the Court concluded that "The activities of the appellee's (appellant here) agents in making the sales did not change the situs of his securities any more than they affected his domicile", and "That said activities incidentally involved interstate commerce is immaterial." (R. 35.)

Naturally the situs remained at the appellant's place of domicile in Indiana for all purposes of taxation until title to the securities sold passed to the purchasers upon delivery in New York. The same is true of the Adams case, or any case of sale F. O. B. at destination, in which case the situs of the property sold, for the purposes of taxation, remains where it was until title passes upon delivery to the purchaser. The intangibles of appellant so sold were taxable for Intangibles Tax of Indiana and for Gross Income Tax on the dividends and interest received therefrom and for gross receipts upon intrastate sales thereof, if any had been sold intrastate, at the place of his domicile in Indiana until title passed to the purchasers on delivery

in New York. It was the responsibility of appellant to deliver at New York the securities sold, as agreed and intended by the appellant and the buyers and according to the rules of the New York Stock Exchange.

The delivery point, where the title passes in sales of property, is the place agreed upon and intended by the seller and the buyer, and is the place where the situs, for purposes of taxation, changes from where it was before sale to where it is afterward.

In re Globe Varnish Co. (1940), supra, 114 Fed. (2d) 916, affirmed 312 U. S. 690.

In that case, involving a sale and shipment from Illinois and delivery in Wisconsin according to the intent of the parties, the Court held that "as Wisconsin has the right to levy a compensating use tax on property such as here involved, Illinois, aside from the exemption, cannot validly levy a privilege tax measured by the proceeds of the sale, as this would result in two taxes upon an interstate sale, while a local sale would be subject to only one." (114 Fed. (2d) at page 919.)

There the situs changed immediately upon delivery in Wisconsin, when and where the property became subject to taxation in the State of Wisconsin.

This is in accord with the holding in the case of McGoldrick v. Berwin-White Coal Mining Co., supra (1940), 309 U. S. 33, 60 Sup. Ct. 388, wherein the Supreme Court of the United States said:

> "Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey

from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority." (60 Sup. Ct. at pages 395-396.)

The appellant is unable to comprehend the reasoning of the State Court in this connection (R. 34-35), for surely there can be no doubt but that the situs of appellant's intangibles changed at the place of delivery, New York, on the sales thereof in interstate commerce, whereupon they became immediately taxable at their new situs in the state of the buyer.

It does not appear that this proposition or reasoning of the State Court, which was advanced by the appellee herein in that Court, constitutes any sound or logical basis for the decision of the Court against the appellant.

* * * * * * *

The appellant respectfully submits, therefore, that the Gross Income Tax Act of 1933 of the State of Indiana cannot constitutionally be enforced against the appellant on account of his sales of said intangibles in interstate commerce, because the application of the tax imposed thereby to his gross receipts from such sales is in violation of and repugnant to Article 1, Section 8, of the Constitution of the United States.

Conclusion

In view of the foregoing, the decision of the Supreme Court of the State of Indiana should be reversed.

Respectfully submitted,

GATH P. FREEMAN,
Attorney for Appellant.

APPENDIX A

Chapter 117, Indiana Acts 1937

Burns Indiana Statutes Annotated 1933

1943 Replacement

Section 64-2601, et seq.

AN ACT to amend Sections 1, 2 (reciting the sections and title of the Gross Income Tax Act of 1933, and of prior amendments thereto) and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That Section 1 of the first above entitled act be amended to read as follows: Sec. 1. That this act may be cited as the "Gross Income Act of 1933."

* * *

(a) When used in this act the term "person" or the term "company" herein used interchangeably, means and includes any individual * * * fiduciary, trustee, executor * * * corporation * * * engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit * * *. (Burns Indiana Statutes, 1943 Replacement, Sec. 64-2601; Sec. 1, Ch. 117, Indiana Acts 1937, p. 604.)

* * *

(m) The term "gross income", except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, * * * and the gross receipts of the taxpayer received from trades, businesses, or commerce, * * * and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets * * * damages, or judgments, and all receipts received by reason of the investment of

capital, including but not in limitation thereof, interest, discounts, rentals, royalties, dividends, fees, commissions, and receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations, and all other receipts of any kind or character received from any source whatsoever, and without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character: Provided, however, * * *

(Here follow certain exceptions not pertinent to this case.) (Sec. 64-2601, supra; Sec. 1, Ch. 117, Indiana Acts 1937, pp. 606, 607.)

Section 2 describes the general scope of the Act as follows:

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided. (Burns Indiana Statutes, 1943 Replacement, Sec. 64-2602; Sec. 2, Ch. 117, Indiana Acts 1937, p. 611.)

Section 3 contains the specific imposition of the tax upon different types of gross income or receipts and specifies the rates applicable thereto. The provisions of Section 3 pertinent to this case are as follows:

> Sec. 3. The tax upon the receipt of gross income hereby provided for, shall be measured by the amount or volume of such gross income and shall be imposed at the following rates:
>
> * * *
>
> (f) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal services * * * all funds received from the investment of capital, and all receipts received from any source whatsoever, the tax shall be equal to one per cent of such part of the gross income. (Sec. 3, Ch. 117, Indiana Acts 1937, pp. 611, 613; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2603. Note: This is subsection (g) in 1943 Replacement.)

(Note: Subsections (a) to (e), (a) to (f) in 1943 Replacement, inclusive, provide, respectively, for a tax of one-fourth of one per cent on gross receipts from wholesale sales, display advertising, one per cent on retail sales, utility service, etc.)

Section 5 provides for a deduction or exemption of $1,000 annually from the gross income of each taxpayer, except retailers, whose deduction is $3,000. (Sec. 5, Ch. 117, Indiana Acts 1937, p. 614.)

Section 6 is a disclaimer of intention to tax receipts derived from interstate commerce, designed to preserve the constitutionality of the Act, and reads as follows:

Sec. 6. There shall be excepted from the gross income taxable under this act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America * * *. (Sec. 6, Ch. 117, Indiana Acts 1937, p. 615; Burns Indiana Statutes, 1943 Replacement, Sec. 64-2606.)

Subsection (c) of Section 8 provides as follows:

(c) Trustees of trust estates, created by will, by contract, by declaration of trust, or by implication of law, shall make returns covering all gross income received by the trust in accordance with such provisions of this act as apply to individuals and other taxpayers. Only one deduction as provided in section 5 may be taken on such return, regardless of the number of beneficiaries of the trust. (Sec. 8 (c), Ch. 117, Indiana Acts 1937, p. 619; Burns Indiana Statutes, 1943 Replacement, Sec. 64-2608.)

The Act contains provisions for collection of the tax, penalties for delinquency, the right to command the sheriff by warrant to levy upon the property of the taxpayer, and to enjoin a delinquent taxpayer from continuing in business, and other remedies, both civil and criminal, to enforce collection of the tax. (Sec. 13, Ch. 117, Indiana Acts 1937, pp. 628-631; Burns Indiana Statutes, 1943 Replacement, Sec. 64-2613.)

APPENDIX B

Regulations, Gross Income Tax Division

Issued April 15, 1940

The pertinent Regulations of the Gross Income Tax Division of Indiana, are as follows:

"Regulation 3900. Interstate Commerce. (The first paragraph recites the provisions of Section 6 (a) of the Gross Income Tax Act, supra, excepting interstate commerce transactions from the purview of the Act.)

"The Department does not include herein any specific rulings on interstate commerce since such transactions involve many technical features, and court decisions vary in their determinations of its necessary elements. Therefore, each question involving interstate commerce must be submitted to the Department and will be considered on its individual merits and the Department herein reserves the right to adjudicate in every case whether or not there exist sufficient elements of interstate commerce to exempt from tax the receipts of any particular transaction.

"Whenever any taxpayer considers any of his receipts to be exempt from gross income tax because of the immunity of an interstate commerce transaction, he will be required to submit all of the facts * * * and such other relevant data as may be required by the Department.

"All taxpayers who are required to file gross income tax returns must include thereon all receipts derived from interstate commerce transactions even though such receipts are not taxable. Proper deductions may then be made on the return for non-taxable receipts.

"The Department will not interpret hypothetical questions involving interstate commerce." (Official Regulations 1940, Article 39, p. 72.)

Intangibles

Regulation 1212 is merely declaratory of the law as provided in the Act (Section 1 (m), supra) and is as follows:

"Regulation 1212. Other Intangibles. Gross receipts from the sale of intangible property are taxable at the rate of 1%. The term intangible property includes notes, stocks in either foreign or domestic corporations, bonds, debentures, * * * and any and all other intangibles capable of being transferred, acquired or sold. The physical situs of the intangibles shall have no bearing upon the taxability of the receipts from the sale or transfer thereof. * * *" (Official Regulations 1940, Reg. 1212, Art. 12, p. 21.)

Out-of-State Sources of Income

"Rule 7.—Sales of Intangible Assets. Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property where the legal situs of such property is in Indiana, even though sale is made outside the state. * * * This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. The legal situs of all intangibles is presumed to be the domicile of the owner. * * *" (Official Regulations 1940, Reg. 3500, Article 35, Rule 7, p. 72.)

Definitions

Regulation 100 is merely declaratory of the law as provided in the Act, defining the word "person" (Section 1 (a) of the Act, supra) and is as follows:

"Regulation 100. Person and Taxpayer are synonymous and taxable persons are those defined herein who are within the qualifications of Reg. 101.

"Person includes any 1. Individual—5. Fiduciary—6. Trustee—28. Estate—29. Trust * * *" (Sec. 1 (a).)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40 1 4 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

APPELLANT'S REPLY BRIEF

Gath P. Freeman,
Counsel for Appellant.

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IN THE

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Appellant,

vs.

GILBERT K. HEWITT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S REPLY BRIEF

1

Intangibles Are Subjects of Commerce

After seriously contending in the lower courts that intangibles were not proper subjects of commerce or interstate commerce and that the case of *J. D. Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, 58 Sup. Ct. 913, and cases following it were inapplicable to

this case, on the ground that such decisions concerned tangible property only (Appellant's Brief, pp. 30, 31; R. 24, 26, 28, 29, 30) the appellee now for the first time concedes that intangibles "may be subjects of commerce between the states" (Appellee's Brief, p. 11), but the appellee qualifies that admission by saying that "It is possible to argue that Appellant's transactions in regard to his stocks and bonds did not constitute interstate commerce" (Appellee's Brief, pp. 11, 12). The appellee cites the case of *Chicago Board of Trade* v. *Olsen* (1922), 262 U. S. 1, 32, in which it was held that sales of grain futures were not in themselves interstate commerce although they could be and were regarded by Congress as directly interfering with interstate commerce (Appellee's Brief, p. 12). The appellee does not explain the pertinence of that decision, which seems quite obscure, but is content to drop the subject and to rely wholly on that case for authority that appellant's sales of his stocks and bonds did not constitute interstate commerce. The case cited seems so devoid of any probative value in support of appellee's contention that it would appear fair to charge that the appellee thereby concedes that the sales by appellant of his stocks and bonds constituted interstate commerce within the meaning of the commerce clause.

2

The State of the Buyer, But Not That of the Seller, Is Privileged to Tax

In this connection the appellee states that "It would appear appellant has misconstrued the decisions of this court" (Appellee's Brief, p. 9).

While the appellant carried a heading to that effect in his original brief, page 17, it was obvious from the argument immediately following that the same was not a generalization or pronouncement of the appellant, but of the

Supreme Court of Indiana in its opinion in this case (R. 30, 34) (Appellant's Brief, p. 17).

The appellant does not understand that the Supreme Court of the United States has adopted or applied any such general rule, which of necessity would be entirely arbitrary. The complexity of the subject of state taxation of interstate commerce or of taxable events in connection therewith or incident thereto, in view of the decided cases, is such that the pronouncement of a general rule of application within the spirit and intent of the commerce clause, and at the same time allowing the states any privileges of such taxation, would seem to be beyond the realm of possibility. Although the rationale of the decisions in favor of taxes levied by the state of the buyer is on a sounder foundation in logic and reason and supportable by sound practical considerations, nevertheless some forms of taxes may be levied by the state of the seller, as for instance a tax measured by gross receipts which is in lieu of a general property tax and fairly apportioned, and perhaps others. (57 Harvard Law Review 40, 82.) While for practical purposes and to avoid confusion and uneconomical impediments to interstate commerce, and to apply the principles of taxation, which seem to be more in favor of taxation by the state of the buyer than by that of the seller, it might seem warranted or advisable to adhere to a general rule that the state of the buyer and not that of the seller may tax interstate commerce transactions, it is not the province of the appellant to proclaim such a rule, and the appellant respectfully submits that he did not intend to do so. It might be well if all acts of the states in taxing interstate commerce were replaced by an act of Congress, with reasonable apportionment to the states on some fair and equal basis of general and uniform application throughout the United States, which would seem to accord with the letter, spirit and intent

of the Constitution. But the parties to this action are not concerned with political economy or philosophy of government, but only with the constitutional law under the commerce clause as developed and established by this court.

The very purpose of the commerce clause was to secure and maintain free trade among the several states, *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 64 Sup. Ct. 1023, 1026, and in view of the ramifications and complexities of the innumerable types of state taxes invented to provide state revenue and to circumvent the commerce clause, and the resultant confusion and impediments to and burdens upon interstate commerce, it might appear advisable to adhere to a general rule or arbitrary formula that the state of the buyer but not that of the seller may tax, if either be permitted to do so, and let the states accommodate their tax laws thereto. This would provide the states with revenue, would have the virtue of at least partial uniformity of application and at the same time require interstate commerce "to bear its share of the tax burden."

To one engaged in buying and selling or holding securities for investment purposes, or for legitimate speculation, it seems of little importance that a tax imposed upon his selling of securities in interstate commerce is not greater than he would be required to pay upon an intrastate sale. The state has the right to burden its internal commerce with taxes, within constitutional bounds, but not to illegally burden interstate commerce. The imposition of the gross income tax of Indiana upon the receipts from sales of intangibles in interstate commerce at the rate of one per cent involves a substantial tax liability each year and precludes the making of many sales in commerce between the state of Indiana and other states not only by appellant but by many other residents of Indiana, thereby reducing the volume of such commerce and thwarting and hampering the same contrary to and in violation of the commerce clause. A larger

rate of tax could and would destroy all such commerce. And the taxation of gross receipts, or equivalent taxes in both the state of the buyer and the seller would undoubtedly accomplish the same result.

This court has never sanctioned the imposition of taxes measured by gross receipts in both the state of the buyer and the state of the seller on the same interstate transaction. *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 435, 64 Sup. Ct. 1019, 1023. 57 Harvard Law Review 40, 70, 72-74, 82.

3

Cases Cited or Discussed by Appellee

All of the cases cited or discussed by the appellee in his brief which concern interstate commerce or which throw any light on the issue here involved were cited or discussed by the appellant in his original brief, except those mentioned and discussed as follows:

The case of *United States* v. *Southeastern Underwriters Association* (1944), 322 U. S. 533 (Appellee's Brief, p. 17), was an action by the United States Government under the Sherman Anti Trust Act and did not involve state taxation of interstate commerce, but it was held therein that the trafficking in insurance contracts across state lines constituted interstate commerce subject to regulation by Congress.

All the other cases above referred to, cited by the appellee in his brief and which concern interstate commerce transactions and the taxing thereof, are in accord with the decision of the *Adams* case and in no wise at variance with it. In fact the *Adams* case is cited with approval in several of those cases. The appellee has cited no case which is inconsistent with the decision of the *Adams* case, and this appellant, in a careful search for authorities, has found none.

In the case of *International Harvester Co.* v. *Department of Treasury* (1944), 322 U. S. 335, 64 Sup. Ct. 1019, supra, all of the sales described in the several classes were consummated on deliveries made in Indiana, "transactions consummated within the borders of Indiana," and the court sustained the tax as applied thereto (Appellee's Brief, pp. 5, 9, 10). The same is true of *Department of Treasury* v. *Wood Preserving Corp.* (1941), 313 U. S. 62, 61 Sup. Ct. 885. (Appellee's Brief p. 10.) Thus they are readily distinguishable from the *Adams* case and the case at bar.

In the case of *McLeod* v. *Dilworth Co.* (1944), 322 U. S. 327, 64 Sup. Ct. 1023, supra (Appellee's Brief, pp. 5, 9, 10), this court held, in agreement with the Supreme Court of Arkansas, in condemning the tax, that the sale there involved was different from that in the *Berwind-White Coal Mining Co.* case in that the sale, the transfer of ownership, was consummated on delivery in Tennessee, the state of the seller, to the Arkansas purchaser, whereas in the *Berwind-White* case the Pennsylvania seller completed his sales in New York, where the seller maintained offices and took orders, and that "for Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction." This case appears to have little or no probative value in the case at bar, except as to general principles involved in such transactions. While the appellee asserts that "the facts were practically identical with the facts in the *Adams* case" (Appellee's Brief, p. 5), there is really no similarity in fact.

The same can be said of *General Trading Co.* v. *State Tax Com.* (1944) 322 U. S. 335, 64 Sup. Ct. 1028, (Appellees' Brief, p. 11), which sustained a use tax of Iowa on property purchased and delivered in interstate sales from Minneapolis on orders taken by salesmen in Iowa approved by the home office in Minnesota, whence the goods were shipped into Iowa.

The case of *Southern Pacific Co.* v. *Gallagher* (1939), 306 U. S. 167, (Appellee's Brief, p. 12), is another use tax case, wherein a use tax of California was upheld on shipments from out-of-state into California by the Southern Pacific Co. of its property for its use in said state.

All of said cases cited by the appellee involved taxes of the state of the buyer, or sales consummated in the taxing state by a resident buyer or by a non-resident buyer in the taxing state, except the *McLeod* case above differentiated, and except the *Adams* case, which was also cited by appellee.

Like the *Adams* case, the sales in the case at bar were made by a resident of Indiana to purchasers residing in other states, in this case consummated on deliveries made in New York, in the *Adams* case consummated on deliveries made in other states and foreign countries. The sales were not consummated in Indiana, as in the *International Harvester* and *Wood Preserving Corp.* cases.

The Gross Income Tax of Indiana Is Laid Directly On Gross Receipts From Interstate Commerce

The appellee asserts that "in *Adams Manufacturing Co.* v. *Storen* (1938), 304 U. S. 307, 310-311, this court erroneously rejected the characterization by the Indiana Supreme Court of the Indiana Gross Income Tax as a tax upon residents based upon the privilege of domicile." (Appellee's Brief, p. 6.)

The statute imposes the tax upon the "receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income * * *". (Burns Indiana Statutes, 1943 Replacement, Sec. 64-2602; Sec. 2, Ch. 117, Indiana Acts 1937, p. 611; Appellant's Brief, Appendix A, p. 45.) The statute applies alike to persons domiciled in Indiana

and to non-residents, so far as the receipts of gross income derived from activities or businesses or any other source within the state is concerned. So it can hardly be contended that the tax is based on the "privilege of domicile."

In the *Adams* case the Attorney General said in his brief that it was a privilege tax upon the receipt of gross income; the regulations of the Department of Treasury, pursuant to authority granted by the Act, treated the exaction as a gross receipts tax, and this court held it to be such a tax in the following language:

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales." 58 Sup. Ct. 913, 915, 916.
>
> . . . . . .
>
> "We hold that, as respects the appellant's sales of its manufactured product in interstate and foreign commerce, the statute cannot constitutionally be enforced." 58 Sup. Ct. 913, 917.

5

Multiplicity of Tax Burdens

The appellee assumes and asserts that "Since the mere possibility of multiplicity of taxes is no longer to be considered as an invalidating factor, this rationale of the *Adams* case is not here applicable." (Appellee's Brief, p. 6.) Previously (Appellee's Brief, p. 5) the appellee says that "The rationale of the *Adams* case, if not repudiated by this court, is at least subject to serious question," because, as the appellee says, "One major premise of that case was that the interstate features of the transactions involved were exposed to the danger of a multi-

plicity of taxes by the several states in which the component parts of the commerce occurred," and that "This premise no longer exists." The appellee cites the case of *McLeod v. Dilworth Co., supra,* in support thereof, which is not in point, because in that case the tax in the state of the buyer, Arkansas, was condemned for the reason that the sale was held to have been consummated on delivery in the state of the seller, Tennessee, as hereinabove discussed. To regard the *McLeod* case as authority for appellees' proposition would be to disregard the decision in the *Berwind-White* case, *supra.* The case was decided on the ground that the sale was consummated in Tennessee, not in Arkansas.

The appellee also cites the *International Harvester Co.* case, *supra,* 64 Sup. Ct. 1019, in support of this proposition, saying that in that case "this court specifically held that where the record discloses no tax upon the same event by another state the mere possibility of such a tax will not invalidate the tax already levied and that as to the invalidation of a tax by reason of a multiplicity of levies '* * * it will be time to cross that bridge when we come to it.'" (Appellee's Brief, pp. 5, 6.)

It would seem that the appellee wholly misunderstood the holding of this court in that respect. The opinion of the court and the tax there involved concerned "Class D" sales which were sales by an Indiana seller, International Harvester Co., of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another state. 64 Sup. Ct. 1019, 1021. The court held that both the agreement to sell and the delivery took place in Indiana and that those events would be adequate to sustain a sales tax by Indiana, citing the *Berwind-White* case and other authorities, and in conclusion the court said:

> "Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued

that appellants will in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales * * *. But it will be time to cross that bridge when we come to it. * * * But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the Seller. Cf. J. D. Adams Mfg. Co. v. Storen, supra. We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (McGoldrick v. Berwind-White Coal Co., supra, 309 U. S. at page 58, 60 Sup. Ct. at page 398 * * *) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage:" 64 Sup. Ct. 1019, 1023.

For the appellee to argue that the appellant did not pay any tax upon his transactions in any other state is begging the question. It is obvious that taxes paid by either the buyer or the seller levied on interstate commerce transactions do burden, thwart, discourage, hamper and prevent such commerce, varying in degree in proportion to the amount of tax, whether paid by the seller, the buyer or both. If the taxes are in excess of taxes legally levied by a state on local commerce in a similar transaction they are illegal burdens and unconstitutional. Taxes levied by the state of the seller measured by the full sales price upon an interstate transaction have been uniformly condemned, with certain exceptions hereinbefore noted (for instance, a tax measured by gross receipts in lieu of a general property tax), and under the practical approach as now applied by the court such a tax imposed by the state of the buyer is sustained, *McGoldrick* v. *Berwind-White Coal Mining Co.*,

supra, in which case the court stressed the nondiscriminatory effect of the sales tax which equalized the tax burden between interstate and intrastate sales. But this would not be true if the seller's state could likewise impose such a tax on the same interstate sale. Unlike a tax on transportation, there is no practicable basis on which to apportion a sales price between the seller's and the buyer's state. 57 Harvard Law Review 40, 69, and Note 138.

There was no evidence in the *Adams* case that any tax was paid to or in any other state by the seller, the J. D. Adams Mfg. Co., or by the buyers of its products. But it is common knowledge that all states have tax laws taxing both tangible and intangible property and/or the use and/or the income and/or the receipts thereof or therefrom.

The state of Indiana has an Intangibles Tax Act enacted in the year 1933 (Ch. 81, Indiana Acts 1933, p. 523; Burns Indiana Statutes, 1943 Replacement, Sec. 64-901), which in definition is a privilege tax required to be paid by every person, including among others fiduciaries and trustees, residing in or domiciled in the state for the right to exercise any one or more of the privileges therein enumerated, including among others the right of selling, assigning, transferring, renewing, removing, consigning, mailing, shipping, trading in and enforcing intangibles, which by definition in the Act include among others promissory notes, stocks in foreign corporations, bonds and debentures. The Act recites, Sec. 64-931, that the tax imposed shall be in lieu of all other taxes except estate and/or inheritance and gross income taxes which might have been or might be imposed upon intangibles or against the owners or holders thereof by virtue of any prior law.

Prior to the enactment of the Intangibles Tax Act intangibles were subject to the general property tax laws. The intangibles tax is in lieu of the property tax but in

practical effect is a property tax, but the gross income tax is not.

There is nothing to prevent any other state from enacting an intangibles tax law similar to the Indiana Act, and it is fair to assume, without any evidence in the record of this case, that all states have tax laws taxing intangibles based on their value or sales price and/or the receipts and income therefrom.

The Indiana intangibles tax, which is levied immediately on purchase or acquiring of intangibles, is tantamount to a sales tax because it is defined in the Act as a tax on the privilege of the owner of selling intangibles and because upon the purchasing or acquiring of intangibles from out-of-state the tax immediately attaches on delivery to the purchaser and is payable in ten days thereafter, with penalties for default. Thus the State of Indiana already has two sales taxes on sales of intangibles, which, if the gross income tax stands as a valid tax, unduly burden interstate commerce, to the extent at least that they are in excess of the amount imposed on intrastate sales. Corporate stocks and bonds maturing in more than one year are called annual intangibles, the tax paid upon purchase or acquiring is for one year thereafter, and the tax is payable within ten days after each succeeding annual anniversary. The tax is 5¢ on each $20.00 of the actual value or fractional part thereof of each annual intangible, represented by stamps attached thereto.

On purchase the value is measured by the market or sales price.

If an Indiana resident sells to another Indiana resident, there is only the gross income tax payable on the transaction, not the intangibles tax, but if he sells interstate to a resident of another state having such or similar intangibles taxes there is that tax on the transaction in the state of

the buyer in addition to the gross income tax of Indiana paid by the seller. Sales of intangibles are subject to sales taxes, or taxes which are tantamount to or the equivalent of sales taxes, in the state of the buyer or where the sale is consummated, in the same or similar fashion as sales of tangible property for consumption or use, so far as the commerce clause is concerned.

If an owner sells a security and reinvests the proceeds in another security purchased out-of-state, without the Indiana intangibles tax paid thereon, he is liable again, immediately on purchase, for the intangibles tax on the reinvestment of the same capital, as well as for gross income tax on the receipts from each sale. This is true *ad infinitum*.

If other states have similar tax laws, which they do have or could have, can it be said with any plausibility that such taxes in the state of the buyer coupled with the gross income tax of Indiana in the state of the seller do not illegally burden interstate commerce?

The operation of the Indiana intangibles tax in this connection is so similar in effect to that of a sales tax that the difference, if any, is in name and not in substance.

It is evident that any state may have a sales tax or equivalent tax on sales of securities, with equal and similar burdening effect on interstate commerce as on sales of tangible property.

The appellee still clings to his theory of situs (Appellee's Brief, pp. 9-15) although it is not clear from the argument just what the theory is.

On sales of tangible property the situs for purposes of taxation changes at the place of delivery and consummation of sale to a new situs, and on sales of intangible property the situs likewise changes at the place of delivery and consummation of sale from the place of domicile of the seller to that of the buyer. In the case of tangible prop-

erty the delivery is of the things sold, or perhaps of a bill-of-sale, bill of lading or title papers of some kind. In the case of stocks and bonds the delivery is of the stock certificates assigned for transfer of the shares evidenced thereby or of the bonds evidencing the debt. Does the appellee mean that there can be no sale consummated within the meaning of the commerce clause unless the buyer takes actual physical possession of the thing purchased?

The appellee and the State do not construe the Intangibles Tax Act in such manner, but hold that the intangibles tax attaches immediately on purchase by and delivery to an Indiana resident. The purchase and delivery is consummated in case of stocks and bonds by the delivery to the Indiana purchaser of the stock certificates and bonds, whereupon the situs of the corporate stock evidenced thereby or bonds, as the case may be, changes to the place of domicile in Indiana of the purchaser. There is no doubt about that. And likewise there is no doubt that in selling stocks or bonds interstate by an Indiana resident the situs changes to the place of domicile of the purchaser in another state upon consummation of sale and delivery of the stock certificates or bonds.

In case of securities sold through the New York Stock Exchange the delivery and consummation of sale is made in New York according to the rules and regulations of said Exchange, but the purchaser may be domiciled in any state or in a foreign country.

The appellee surely does not contend that the situs remains with the seller even after consummation of sale and delivery of the securities sold. Surely the state of the buyer, or the state where the sale is consummated, can lay a tax thereon to the same extent and with the same effect as in case of tangible property.

Conclusion

The appellant respectfully submits that for aught that appears in appellee's brief and for the reasons hereinabove and in appellant's original brief set forth, the decision of the Supreme Court of Indiana in this case should be reversed.

Respectfully submitted,

GATH P. FREEMAN,
Attorney for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 4 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF ON REARGUMENT

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IN THE

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OCTOBER TERM, 1945

No. 4

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

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APPELLANT'S SUPPLEMENTAL BRIEF ON REARGUMENT

By the order of the Court set forth in its Journal for October 8th, 1945, page 7, Cause No. 4, the Court requested that counsel address themselves in their briefs and on oral argument to certain questions, which are hereinafter chronologically set forth as headings and subjects for discussion and argument as follows, to-wit:

1

Were the sales of securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, interstate sales within the meaning and application of

Adams Mfg. Co. v. Storen, 304 U. S. 307; cf. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 58?

For a discussion of this question and citation of authority the appellant refers to his original brief, pages 9-11 (Summary of Argument) and pages 30 to 40, line 5, inclusive (Argument).

The appellant believes that there are no new cases or authorities decisive of or bearing upon this question, since the case decided in 1944 of United States v. Southern Underwriters Association, 322 U. S. 533, referred to and discussed by appellant in his Reply Brief, page 5. In this latest decision of this Court it was held that the trafficking in insurance contracts across state lines constituted interstate commerce subject to regulation by Congress by virtue of the commerce clause.

If there were ever any serious or reasonable doubt that corporate stocks and bonds were proper subjects of commerce and interstate commerce, such doubt has long since been resolved both by the Court and by Congress. (Appellant's Original Brief, pages 33-40.) In providing for the regulation of the interstate traffic in corporate stocks and bonds by the enactment of the Securities and Exchange Act, the Congress recognized that such intangibles were proper subjects of commerce and interstate commerce and gave effect to its right to regulate the interstate traffic therein. And the Congress having acted in this matter and having assumed the control and regulation of such interstate business and having actually exercised its power in said respect under the commerce clause of the Constitution, the states are of necessity precluded from levying taxes or exercising other control or regulation inconsistent with or repugnant to such power of Congress.

If the commerce clause is to be preserved and the rights and powers of the Federal government under the commerce clause maintained, and if the same is not to be abandoned or completely nullified, it would seem that the encroachment of the states into the field of interstate regulation by taxation and otherwise will have to be curtailed. The commerce clause was designed to preserve the freedom of trade among the several states and the peoples thereof, without tariffs, duties, taxes or other levies imposed for whatever reason or motive by the states to thwart or hinder the same or preclude free intercourse and movement of trade and commerce anywhere within the national boundaries or with foreign countries.

Surely the trade in corporate stocks and bonds has attained such colossal proportions that it can not be seriously contended that the sales thereof in interstate commerce are not of the type of property intended to be within the purview of the commerce clause. The Constitution does not define or limit the kind of property intended to move freely in interstate trade, and there surely can be no doubt that it was intended that all property which is the subject of legitimate commerce should move freely in the channels of interstate trade. Why should one kind of property which is commonly and in great volume bartered and sold interstate be excluded from the protection of the commerce clause, while another kind of property is included therein? What possible circumstances could there be to require such a differentiation? Why should sales of stocks and bonds be taxed and sales of tangible property not taxed? By what quirk of logic could the rationale of the Adams case be applied only to manufactured goods or tangible property?

If commerce in securities among the states were subjected to state taxation such as the Indiana gross income tax,

the very object and purpose of the commerce clause would be defeated. There would be no free trade among the states, eventually no trade at all of stocks and bonds and securities, as it seems to be one of the frailties of human nature that the legislature of no state would permit that of any other to outdo it in the exercise of its power to tax. A tax by one state would suggest or provoke a tax by another. A rapacious desire would make it larger. Retaliations and reprisals would follow. Trade would come to a standstill and the Court would be engulfed with litigation. The same is true with respect to interstate commerce in tangible property, if the bars of the commerce clause were let down and such decisions as that of the Adams case and other cases upholding the commerce clause were overruled. To obviate this risk of a multiplicity of state tax burdens, to obviate the risk of a multiple burden to which local commerce is not exposed, to insure free trade among the states was and is the purpose and intent of the commerce clause. The extent and volume of interstate sales of securities has equalled or approached that of sales of tangible property. The Adams case, the Gwin, White & Prince case, the recent case of McLeod, Commissioner &c. v. J. E. Dilworth Co., 322 U. S. 327, 64 Sup. Ct. 1023, 1026, and a long unbroken line of decisions confirm this lofty purpose of the commerce clause. In the McLeod case, supra, the Court said:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." (64 Sup. Ct. 1023, 1026.)

The case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 Sup. Ct. 388, is readily distinguishable

from cases involving a double or multiple state tax burden, the court in that case saying:

> "This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods—effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, (Citing cases) and when the extra-state seller has shipped them into the taxing state for sale there." (Citing cases) (60 Sup. Ct. 388, 394) (Appellant's brief, page 19).

The rationale of this decision is that the tax is upon the buyer and is analogous to a "use" tax or a property tax on property at its destination, the Court in this connection saying:

> "Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax upon the "use" of property which has just been moved in interstate commerce—(Citing cases) or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. (60 Sup. Ct. 388, 394.) * * *
>
> "Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority." (60 Sup. Ct. 388, 395, 396.)

That intangibles such as stocks of foreign corporations and bonds are proper subjects of state property tax and similar taxes in the state of the domicile of the owner has long been the law in every state, supported by precedent in uniform and consistent decisions. Before sale or transfer in interstate commerce they are subject to such tax in the state of the seller, and upon consummation of sale and delivery they are subject to tax at the domicile of the buyer as the new owner. Stocks of foreign corporations and bonds have always been taxable to the owner at his domicile, in the absence of proof of a different taxable situs. Tangible property has always been taxable to the owner in the jurisdiction where the property is located. But either type of property is taxable to the new owner, the buyer, in the state of destination or the state of the buyer after an interstate sale and delivery.

The appellant feels that he has adequately argued these questions in his original brief, pages 21 to 29, showing that the state of the buyer or state of destination undoubtedly had the power to impose a property tax or similar tax upon intangibles such as corporate stocks and bonds at the end of an interstate journey or transfer in consummation of the interstate sale thereof (Appellant's reply brief, pages 8 to 13). The appellant points out that any state has the power to impose a property or similar tax on intangibles, and that the state of Indiana now has an intangibles tax which is in lieu of the general property tax and which is tantamount to a sales tax because upon the purchasing or acquiring of intangibles from out-of-state the tax immediately attaches on delivery to the purchaser in Indiana. And the appellant points out that other states have or could have similar tax laws respecting intangibles, and that the operation of such intangibles tax in this connection is so similar to a sales tax that the difference, if any, is in name

and not in substance. (Appellant's reply brief, pages 11 to 13.)

From a consideration of such cases as Berwind-White Coal Mining Co., supra, and other lucid and compelling opinions and decisions cited and discussed in appellant's original brief and reply brief herein, analyzing and declaring the rights and powers of states in the matter of taxation in connection with sales of property in interstate commerce, it is logically deducible that any state of destination or state of the buyer or where sale or delivery is consummated may levy a sales tax, a property tax or equivalent tax on any property or receipts of sales of any property which is a subject of commerce, whether tangible or intangible, with like effect and to the same extent regardless of whether tangible or intangible. There is no inherent difference in the ' xation of property, whether tangible or intangible, at least no difference so far as interstate commerce is concerned.

The Indiana gross income tax is as much an unconstitutional burden upon interstate sales of stocks and bonds or other intangible property as it is on interstate sales of tangible property. There is no difference in practical or legal effect. It is an additional burden on interstate commerce or trade in intangibles not borne by local commerce and is unconstitutional for the same reasons found and determined in the Adams case with respect to tangible property.

Therefore, the appellant respectfully submits that the sales of securities on the New York Stock Exchange, as made by the appellant in this case, were interstate sales within the meaning and application of Adams Mfg. Co. v. Storen, 304 U. S. 307; cf. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 58, and other authorities cited and discussed by the appellant in his briefs herein.

2

Does the commerce clause forbid Indiana to levy a gross receipts tax upon the transactions in question, in the absence of any showing that a similar or substantial tax is, or may be, in fact laid upon them by any other state?

The appellant discusses at length in his original brief, pages 21 to 29, inclusive, the case of O'Kane v. State (1940), 283 N. Y. 439, 28 N. E. (2d) 905, cited by the State Court in its decision from which this appeal is taken (R. 34). The appellee had cited and relied upon the O'Kane case in the State Court.

On page 21 of appellant's original brief it is shown that the O'Kane case involved a stamp tax of the state of New York upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares * * * whether made upon or shown by the books of the corporation * * *." The tax is 1½c per share sold for less than $20 and 2c per share sold for more (28 N. E. (2d) 905, 907).

In the stipulation of facts it is set forth that all of appellant's sales were handled in the usual and customary way of sales of intangibles through the New York Stock Exchange, and that the Court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange (R. 17, 21), (Appellant's original brief, See Statement, page 3, third literary paragraph page 5).

The appellant respectfully submits that in addition to the O'Kane case cited by the State Court in its opinion and discussed by the appellant in his original brief, there is other showing in this case that a similar or substantial

tax was and is in fact laid upon sales or receipts from sales by the state of New York, as well as by the state of Indiana. It is common knowledge that the state of New York does tax all such transactions and that no member of the New York Stock Exchange is permitted under the law or the rules and regulations of the Exchange to consummate any sale thereon without collecting from the seller by withholding from the purchase price or otherwise the amount of tax payable to the state of New York. The practice is to withhold the amount of tax from the purchase price in settling with the seller. If the Court needs authority for considering such tax laws of New York State or of the state of the buyer or the rules and regulations of said Exchange, in determining the issue in this case, the authority is provided by the stipulation of facts herein (R. 17, 21).

However, it is the appellant's contention that it is not necessary to show or establish that a similar or substantial tax upon such gross receipts is in fact levied upon the same transaction by another state. No such showing was required in the Adams case, nor in Gwin, White & Prince v. Henneford et al. (1938), 305 U. S. 434, 59 Sup. Ct. 325, nor in any case yet decided by this Honorable Court. There was no evidence in the Adams case that any tax was paid to or in any other state by the seller, the J. D. Adams Mfg. Co., or by the buyers of its products, but it was implied, inferred or presumed by the Court that the property sold would be subject to property tax or similar tax in the state or states of delivery or destination. No specific proof of any such tax laws was required. And in the Gwin, White & Prince case this Court disposed of that suggestion or argument with the opinion and statement that:

> "Such a multiplication of state taxes, each measured by the volume of the commerce, would reestab-

> lish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that SOME OTHER STATE MAY FIRST HAVE SUBJECTED THE COMMERCE TO A LIKE BURDEN." (Our italics) (59 Sup. Ct. at pages 327, 328) (Appellant's original brief, third or last literary paragraph, page 25).

The question and subject of the risk of a multiplicity of state taxes, the risk of a multiple burden to which local commerce is not exposed, is discussed in appellant's original brief, pages 15 to 29, and in appellant's reply brief, pages 2 to 13.

So far as the appellant has been able to discover there is no logical basis and no precedent for the validation of a tax on gross receipts or measured by gross receipts in the state of the seller from interstate sales, although a tax in the state of the buyer or at destination where delivery is made is justifiable under the reasoning of the Berwind-White decision.

The securities in this case were delivered in New York (R. 20) (Appellant's original brief, pages 7, 42) on shipments by United States mail from Richmond, Indiana, on sales negotiated by interstate communication by telegraph in the usual course of sales and such business on the New York Stock Exchange. It was the responsibility of appellant to deliver at New York the securities sold, as agreed and intended by the appellant and the buyers and according to the rules of said New York Stock Exchange.

Therefore, it may be reasoned with impelling force, supported by impeccable precedent, that it is not necessary or requisite to show that a tax is in fact imposed or levied in the state of the buyer in order to invalidate a tax on the same transaction in the state of the seller. It is suf-

ficient to show, which usually can be implied or inferred, that the property sold in interstate commerce is subject to taxation in the state of destination or where the sale is consummated or delivery made. It would seem self-evident that any property, either tangible or intangible, which is a subject of commerce and interstate commerce would be a subject of state property tax or equivalent tax both in the state of the seller before sale and in the state of the buyer or at destination, as the case may be, after sale and delivery. The Constitution does not define the word "commerce," but as applied to trade it has been defined as the exchange of goods or property of any kind for money or for other goods or property. (Appellant's original brief, page 32.) The fact that the securities in this case were sold for a large aggregate amount of money (R. 18, 19; Appellant's original brief, page 5) is sufficient to show and establish that they were taxable and had taxable value immediately on delivery in the state of the buyer, in New York state or the state of destination for property tax or equivalent or similar tax which such state might see fit to impose. The Court would have the right to presume and to take judicial notice that such securities of substantial value would be so taxable in such state. It surely would not be necessary to make formal proof of such state tax laws. And if said securities were subject to such state taxation, and it would seem as a conclusion of law that they were, then a tax measured by gross receipts of the sales in the state of the seller must of necessity and by logical conclusion be unconstitutional and void, for it would constitute an additional burden on interstate commerce not borne by local commerce. The decision in the Adams case would apply with equal force to invalidate the Indiana gross income tax as applied to receipts from sales interstate of such securities as to the tangible property therein involved.

3

To what extent, if any, is Indiana's power to tax the gross receipts from these transactions affected, under the commerce clause, by the facts that domicile of the seller or situs of the securities prior to conclusion of the sales was in Indiana?

Indiana's power to tax gross receipts from an interstate sale of securities by a resident of Indiana to a resident of another state, as in this case, is completely precluded and abrogated by the commerce clause. The power to impose taxes on such commerce is vested in Congress, not in the states, under the decisions of this Court hereinabove and in appellant's original and reply briefs cited and discussed.

The question of situs has never been an issue in this case. The law of domicile and taxable situs of tangible and intangible property has not been and is not now in dispute. The Indiana domicile of appellant and Indiana situs of appellant's stocks and bonds were alleged in his complaint (R. 2-4) and in the stipulation of facts (R. 17, 21) to show the interstate character of his sales thereof, and for no other purpose. (Appellant's original brief, pages 40 to 43; Appellant's reply brief, pages 13, 14).

The discussion of the matter of situs and the rule "mobilia sequuntum personam" by the appellee in this case appears to be an abstruse and semantic dissertation on an uncontroverted subject of no probative value in this case. The matter is fully discussed in appellant's original brief, pages 40 to 43, and in his reply brief, pages 13, 14.

CONCLUSION

The appellant respectfully submits that for the reasons shown the decision of the Supreme Court of Indiana in this case should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1946

No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLANT'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CAUSE

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IN THE

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No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLANT'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CAUSE

The appellant[1] is the trustee of the estate of Henry C. Starr, deceased (R. 17). Both Henry C. Starr and appellant were residents of Wayne County, Indiana (R. 17). During the year

1. Appellant was originally Gath P. Freeman, as trustee under the will of Henry C. Starr, deceased. On June 4, 1946, he died. Under the will of Henry C. Starr, Almira G. Freeman, the widow of Gath P. Freeman, was named successor trustee. On July 20, 1946, the succession of the widow to the trust was approved by the Circuit Court of Wayne County, Indiana. A motion for substitution has been presented.

1940 appellant sold certain corporate stocks and bonds belonging to the estate (R. 18-19). Under protest appellant reported to appellee as a part of his gross receipts as trustee the total sale price of $65,214.20 received for the stocks and bonds and paid in 1941 a tax at the rate of one per cent, or $652.14 (R. 18). The tax was levied under The Indiana Gross Income Tax Act of 1933 (R. 3). Appellant took all of the steps required to claim a refund which was denied (R. 21).

A suit was instituted against appellee to recover the tax in the Circuit Court of Wayne County, Indiana, upon the ground that the receipts taxed were from business conducted in commerce between the states and that the tax constituted a regulation of and burden on such commerce in violation of Section 8, Article I of the Constitution of the United States (R. 2-6). After answer and trial, judgment for the full amount of the tax was entered on March 26, 1943, in favor of appellant (R. 9-10). Appellee's motion for a new trial was overruled (R. 10-11) and appellee took an appeal to the Supreme Court of Indiana (R. 24). On October 25, 1943, that court reversed the judgment (R. 30-35). A rehearing was denied (R. 36-39). An appeal was taken to this court (R. 39-40). Probably jurisdiction was noted April 3, 1944 (R. 46).

The stocks and bonds, the receipts from the sale of which were taxed, were sold by appellant on sale orders placed with a broker operating a place of business in Richmond, Indiana (R. 19). The broker's office was the usual one maintaining a board and leasing wires to the Chicago and New York exchanges for constant daily market information (R. 19). The Richmond broker had a direct wire to a brokerage office in New York City (R. 20). The New York broker was a member of the New York Stock Exchange (R. 20). When trustee placed the sell orders he "knew and intended" that the Richmond broker would immediately communicate with the New York broker over the leased wire and that the New York

broker would immediately offer the stocks or bonds for sale on the New York Stock Exchange (R. 20). This course was followed (R. 20). Upon confirmation of the sale by wire from the New York broker to the Richmond broker and notification to appellant, appellant delivered the stocks or bonds to the Richmond broker (R. 20). By him they were mailed to the New York broker who delivered them in New York to the broker there representing the purchaser, who in turn delivered them to the purchaser (R. 20). The purchaser in each instance lived in a state other than Indiana (R. 20-21). A check for the sales price less commission, cost of revenue stamps, postage, and "other expenses of sale" was delivered by mail to the Richmond broker, who, after deducting his commission, delivered the balance to appellant (R. 20).

The cause was briefed and argued here.

On October 8, 1945, this cause was assigned for reargument, and counsel were requested to address themselves in their briefs and on oral argument to three questions. The questions and appellant's position are:

1. *Were the sales of securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, interstate sales within the meaning and application of Adams Mfg. Co. v. Storen,* 304 U. S. 307; cf. *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, 58?

Appellant answers—yes. (Argument on this question, pages 7 to 10 infra.)

2. *Does the commerce clause forbid Indiana to levy a gross receipt tax upon the transactions in question, in the absence of any showing that a similar or substantial tax is, or may be, in fact laid upon them by any other state?*

Appellant answers—yes. (Argument on this question, pages 10 to 18 infra.)

3. *To what extent, if any, is Indiana's power to tax the gross receipts from these transactions affected, under the commerce clause, by the facts that domicile of the seller or situs of the securities prior to conclusion of the sales was in Indiana?*

Appellant answers—to no extent. (Argument on this question, pages 18 to 22 infra.)

The Basis of the Tax

The Indiana gross income tax unlike any other tax in any other state is simply a tax upon gross receipts. It is not a tax upon a privilege measured by gross income. It is not a sales tax. It is what it says it is—a tax upon gross receipts.

In the appellee's original brief the attorney-general argued that the tax was "a tax upon residence based upon the privilege of domicile" (Pages 6-8, Brief for Appellee). We do not believe that the attorney-general will now take this position for the reason that since the filing of appellee's brief the character of the act has been officially determined.[2] Under the regulations of the Gross Income Tax Division of the Department of Treasury, adopted with the approval of the attorney-general, there is no doubt now as to the state's interpretation of the act.[3] The regulations, which were adopted accept the

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2. By Chapter 120 of the Acts of the Indiana General Assembly of 1945, effective March 3, 1945, all agencies of the state having power to make rules and regulations, which included the Department of Treasury, were required to follow certain procedures in establishing rules and regulations. All regulations previously adopted were made void. The act required preparation of the rules and regulations by the agency involved, a public hearing after publication of notice in a newspaper published in the city in which the capitol of the state is located, and approval of the regulations by the attorney-general and the governor.

3. Pursuant to the statute set forth in footnote 2 supra, rules and regulations were prepared by the Indiana Gross Income Tax Division of the Department of Treasury. A public hearing was held on these regulations April 8, 1946. The regulations were approved by the attorney-general and the governor and became effective April 27, 1946. The Gross Income Tax Act in section 29

interpretation of this court that the gross income tax "is what it purports to be—*a tax upon gross receipts from commerce.*" The court may now disregard all argument of the attorney-general predicated upon the proposition that the tax is a tax on the privilege of domicile, or any other privilege, measured by gross income.[4]

(3. Continued)
(Chapter 117 of the Acts of the Indiana General Assembly of 1937) authorized the Department of Treasury to promulgate rules and regulations under the act. The regulations, effective April 27, 1946, for the first time defined the type of the tax as follows:

"*TYPE OF TAX. The Indiana Gross Income Tax is, in reality, a gross receipts tax.* The coverage is the widest possible since the entire amount of gross receipts of taxpayers is used as a base. It is not a sales tax even though it applies to receipts from sales. It is not, however, imposed upon the act of sale but upon the receipts from sales when such income is received or credited. It is not an occupation tax because it is applied to every individual, group or firm without regard to the occupation thereof."

"It is not a consumer's tax because the act has no provision for passing the tax on as a separate chargeable item nor would such a provision be valid (Opinion of Attorney General of Indiana, August 21, 1934)."

The nature of the tax has been commented upon by the courts as follows:

> "The law is intended to be general and to operate on all residents of the state and all who derive revenue from sources within the state." *Miles v. Department of Treasury of Indiana*, 1935, 209 Ind. 172; 199 N. E. 372.
>
> "*We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce.*" *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. 1946 Gross Income Tax Regulations, page 1.

4. The regulation set forth in 3 above is consistent with decisions of the Supreme Court of the State of Indiana, except for the language in the state court in the *Adams* case which was repudiated by this court on appeal. See also *Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62, 66, where in referring to the *Adams* case the court said:

"That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana

The attorney-general has occasionally made the argument in cases involving the gross income tax that the tax was in fact in lieu of property taxes. Of course, there is no foundation for this either in the act or in fact. The tax was imposed as an additional tax. It was not a part of any program for the reduction of property taxes, nor has it resulted in the reduction of taxes on real property.[5]

(4. Continued)

corporation from sales in other States of goods manufactured in Indiana. We observed that the tax is not an excise for the privilege of domicile 'since it is levied upon the gross income of nonresidents from sources within the State.' The point of the decision was that 'the tax is what it purports to be,—a tax upon gross receipts from commerce,' and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce."

There is no holding in the Indiana Supreme Court that the tax is based on domicile. In fact the holding in *Miles v. Department of Treasury* (1935), 209 Ind. 172, quoted in the regulations, and in *Department of Treasury v. Crowder* (1938), 214 Ind. 252, overruled on the specific point, but the definition as to the type of tax not repudiated by the court, and in the *Department of Treasury v. Allied Mills* (1942), 220 Ind. 340, and *Department of Treasury v. International Harvester* (1943), 221 Ind. 416, cases are all consistent with the definition of this court in the *Adams* and *Wood Preserving* cases. The latter two decisions rely upon the *Adams* decision.

5. The figures taken from the annual Year Books and Statistical Reports of Indiana demonstrate that the property taxes in the state were not reduced by the enactment of the Gross Income Tax Law. The first full year that the law was in force was 1934. The first column of figures represent the total property taxes collected by all units of government in the State of Indiana from 1934 to 1945. The total intangible taxes collected in the same years is set forth

ARGUMENT

Question 1

THE SALES WERE INTERSTATE IN CHARACTER

The sales of securities involved were negotiated by telegraphic exchange between Indiana and New York. The sales were completed by delivery of the securities by mail from Indiana to New York and return by mail from New York of the check in payment. It was incumbent upon the New York broker for the purchaser to complete delivery to purchasers who resided in all cases in a state other than Indiana and to recover from the purchasers the sale price.

(5. Continued)

in the second column. The total gross income taxes collected in the same years is set forth in the third column. The fourth column is the closing cash balances of the state for the same years.

	Property Tax Collections	Intangible Tax Collections	Gross Income Tax Collections	Closing Cash Balances
1934	$87,437,220.88	$1,284,360.66	$10,392,791.94	$21,963,751.64
1935	95,575,961.18	1,085,909.38	13,642,911.17	27,262,355.56
1936	93,145,960.32	1,326,839.72	16,625,661.55	37,141,462.11
1937	99,688,926.18	1,507,432.87	20,699,646.10	47,544,763.48
1938	98,309,512.97	1,356,879.39	22,421,907.55	48,083,659.27
1939	99,473,099.05	1,252,216.28	20,146,766.06	49,888,457.78
1940	100,303,087.36	1,337,824.94	23,648,497.28	44,083,629.97
1941	105,421,704.10	1,535,034.47	26,054,478.48	48,109,463.23
1942	107,145,956.02	1,899,331.14	33,739,322.56	58,108,741.29
1943	108,729,685.30	1,496,981.30	34,236,158.53	69,610,571.57
1944	104,162,100.08	1,405,090.55	40,838,398.04	78,811,081.41
1945	111,079,966.40	1,482,728.58	46,331,680.86	90,719,200.29

If tangible rather than intangible property was involved there could be no question about the interstate character of the transactions. Recent decisions of this court would seem to foreclose any distinction based solely upon nature of the property. In *United States v. Southeastern Underwriters Ass'n.* (1944), 322 U. S. 533, an indictment of insurance companies for a conspiracy under the Sherman Act was sustained because transactions of such companies across state lines were held to be commerce within the meaning of the clause in the Constitution. In meeting the argument that *Paul v. Virginia* (1869), 8 Wall. (U. S.) 168, held that insurance policies were "not commodities to be shipped or forwarded from one State to another," this court declared, . . . both before and since *Paul v. Virginia* this Court has held that Congress can regulate traffic though it consists of intangibles" (322 U. S. 546).

In *Prudential Insurance Co. v. Benjamin* (1946) —— U. S. ——, this court upheld a South Carolina tax charged to be a discriminatory one against the interstate commerce of insurance not because the business of insurance was not such commerce, nor because discriminatory taxes against commerce were valid, but because an act of Congress (the McCarran Act) gave authority to the states to regulate and tax the commerce of insurance. Cf. *Robertson v. People of State of California* (1946), —— U. S. ——.

These cases and the cases cited in the South-Eastern case[6] establish the proposition that commerce comprehends traffic

6. *Gibbons v. Ogden* (1824), 9 Wheat. (U. S.) 1, 189, 190, 229, 230; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* (1878), 96 U. S. 1; Lottery Case (*Champion v. Ames*) (1903), 188 U. S. 321; *Jordan v. Tashiro* (1928), 278 U. S. 123, 127, 128; *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938), 303 U. S. 419, 432, 433; and *American Medical Association v. United States* (1943), 317 U. S. 519

between states in intangibles as well as like traffic in tangible property.

The transactions upon the New York Stock Exchange in this case only adds emphasis to the interstate character of the commerce. In total such transactions have been declared by Congress to "constitute an important part of the current of interstate commerce."[7] Regulation under acts of Congress of such commerce is now settled beyond doubt.[8]

On any realistic or logical basis it is impossible to conceive that typical transactions across state lines which give character to the whole current of commerce are not also interstate commerce. Whether the legalistic concepts of situs and domicile have any application in this case is discussed under the third question propounded. (Infra pages 18 to 22.) However, at this point it may be observed that such legal fictions do not alter the practical or factual status of the business. It is this aspect of the matter which is the particular concern of the court in commerce cases.[9] Upon such an approach it must be agreed that we have here a case of interstate sales differing from the Adams case[10] only as to the nature of the goods. One involves intangible property; the other, tangible property. Legally the distinction is as imma-

7. Securities Exchange Act of 1934, U. S. C. A. Title 15, Section 78b(1)(b). As an analogous situation in the case tangible property compare stockyard and elevator cases. *Stafford v. Wallace* (1922), 258 U. S. 495, 518-519.

8. *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938), 303 U. S. 419; *Smolowe v. Delendo Corp.* (2CCA, 1943), 136 F. (2d) 231, 240, cd 320 U. S. 751; *Wright v. Securities & Exchange Commission* (1940 2CCA), 112 F. (2d) 89, 94; *Securities & Exchange Commission v. Torr* (1936, D.C.S.D.N.Y.), 15 F. Supp. 315, 320.

9. On the practical aspects of the application of a state tax to commerce compare the analysis in Lockhart's "Gross Receipts Taxes on Interstate Transportation and Communication." (1943) 57 Harvard Law Review 40.

10. 304 U. S. 307 (1938).

terial as one between roadgraders and apples when a tax on commerce is in question.

Question 2

The Commerce Clause Forbids the Levy in Question

The discussion of this question may begin with two matters which are clearly beyond argument; first, this case involves a gross receipts tax upon commerce, baldly just that with no deviation into the field of taxes upon an occupation, or a privilege, or a sale[11]; second, the gross receipts taxes are from transactions in commerce.[12] Whether this is such a tax upon commerce as is condemned by the commerce clause is therefore the only question. We believe the tax should be condemned upon two points under the decisions of this court.

ONE. It operates discriminatorily against commerce, placing such commerce at a competitive disadvantage.

TWO. It is such a tax as may be multiplied by every state which the commerce touches.

That a similar or substantial tax is, or may be, in fact laid upon such commerce is unimportant if the tax in fact operates discriminatorily. That a similar or substantial tax may be levied upon such commerce is enough upon the latter point because surely the right of one state to tax cannot be made to turn upon the chance of whether another state has chosen to tax. Any such a limitation of the *Adams*[13] and *Gwin, White & Prince*[14] cases is not required by subsequent decisions of this court is inconsistent with the spirit and purpose of the commerce clause and would lead to curious results creating great confusion. A tax, for example, by Indiana, valid today

11. See footnote 3, page 4 supra.
12. See pages 7 to 10 supra.
13. 304 U. S. 307 (1938).
14. *Gwin, White & Prince v. Henneford* (1939), 305 U. S. 434.

on commerce moving into New Jersey — because New Jersey has no similar or substantial tax might become invalid tomorrow, not by any act of Indiana, or any change of the laws of Indiana, but because New Jersey later levied a "similar or substantial" tax.

What a "similar" tax would be, the taxpayer would have to determine at his peril. Of course, a gross income tax like Indiana's would be a similar tax—but would a sales tax, a use tax, a compensating tax, an occupation tax measured by gross receipts, a license tax for the privilege of selling with the fee based on gross receipts, or any other tax where gross receipts was the measure of the tax, be a similar tax? Forecasting now the taxes which the ingenuity of state officials may invent is, to say the least, difficult. Defining now the character of similar taxes would be a no less difficult task.

Again at his peril the taxpayer would have to determine whether the tax in the other state was substantial. Is there any standard to which resort may be had for this determination? Would one-tenth of one per cent of the gross receipts be substantial? If not, would five per cent? And if the latter is substantial and the former is not, at what point between does the tax become substantial enough to oust Indiana's right to tax? In the process does New Jersey also lose the right to tax? And, at what point?

If such a rule were announced it would not only unsettle the law,[15] but it would introduce a standard so uncertain that

15. Since the decision of this court in *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, and the other decisions following it, a committee of the National Association of Tax Administration after a great deal of study proposed a Uniform Regulation for all states having sales and gross receipts taxes. The purpose of the regulation was (1) to secure laws and regulations which could be "easily and efficiently administered"; and (2) to make it easier for taxpayers engaged in business in more than one state to comply with the laws of the several states. The regulation applying to tangible personal property set up as taxable, sales in the state

legislators, state tax officials, taxpayers and courts would have so much latitude for disagreement that nearly every question would have to be litigated to final decision by this court. What is similar and what is substantial are questions of fact where no jury can act to put the question at least partially at rest as where, for example, the issue of negligence is determined on the basis of whether defendant exercised reasonable care.

Apart from the chaos and confusion that such a rule would create in this field, the rule alone would add a burden to every taxpayer doing business in more than one state. A company such as the one in the *Adams* case doing business in every state would have to set up accounting systems to segregate

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(15. Continued)

of delivery where the seller was engaging in business in such state and as nontaxable sales in the state of the seller where the seller was obligated to deliver to a point outside of the state. (Paragraph 1-295 Interstate Sales Tax Service, Commerce Clearing House.) This regulation has been adopted by various states. (See Paragraph 1-300 Interstate Sales Tax Service, Commerce Clearing House.)

Cf. the declaration of the Supreme Court of Indiana, where after reviewing the *Adams*, *Western Livestock*, and *Gwin, White & Prince, Inc.*, cases the court declared:

"We are not presently confronted with the problem of multiple taxation since it must be concluded, on the authority of the cases cited, that the State of Illinois could not impose such a tax on the appellee's income from sales in Indiana. The question is, rather, whether the incidental interstate nature of the appellee's business entitles it to be exempted from all state taxes of this character.

"The trend of the recent decisions appear to support the view that under the circumstances of the case before us the imposition of a tax of this character by the buyer's state will be sustained. *Wiloil Corp. v. Pennsylvania* (1935), 294 U. S. 169, Rehearing denied, 294 U. S. 733, 55 S. Ct. 358, 79 L. ed. 838. *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814. *Matter of Sears Roebuck & Co. v. McGoldrick* (1938), 279 N. Y. 184, 280 N. Y. 570, 18 N. E. (2d) 25. 'The Sales Tax in Interstate Commerce' (1939), 52 Harvard Law Review 617. 'State Sales Taxes: The Supreme Court and the Commerce Clause' (1940), 26 Va. Law Review 1030. Such will be the conclusion of this court until the matter is finally put at rest by the Supreme Court of the United States." *Department of Treasury v. Allied Mills, Inc.* (1942), 220 Ind. 340, 342-343.

sales into each of the states. Then after sorting out all sales exempt from a tax in any state it would have to further separate those taxed elsewhere between those where a "similar or substantial" tax was paid and those where there was no "similar or substantial" tax. The returns to the state would have to reflect this situation. This burden alone would be a heavy one upon interstate commerce not borne by local commerce.

We do not believe that the commerce clause calls for any such a precedent shattering determination in this case. Such a decision would require a complete reorientation by tax officials and taxpayers alike at a time when a workable basis is being arrived at under court decisions.[16]

A. *This Tax Operates Discriminatorily.*

The tax as sought to be applied in this case in the state of the seller or origin of the commerce puts the interstate seller at a competitive disadvantage to the extent of the tax.[17] This

16. The uniform regulation referred to in note 15 above has been adopted in substance either in the law or regulations in the following states having sales taxes: Alabama, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Michigan, Missouri, New York, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, and Wyoming; and in the following states having business and occupation taxes: Washington and West Virginia. North Caroline is the only state having a sales tax where in substance the regulation has not been adopted. What the practice there is on this point is not apparent.

17. If a tax in its practical operation works discriminatorily against commerce it is condemned. This court recently said:

"In passing on the constitutionality of a tax law 'we are concerned only with its *practical operation*, not its definition or the precise form of descriptive words which may be applied to it.'

". . . Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions."

Nelson v. Sears, Roebuck & Co. (1941), 312 U. S. 359, 363, 366; cf. also *Best & Co. v. Maxwell* (1940), 311 U. S. 454, 457; *Nippert v. Richmond* (1946), 326 U. S. ——; *Gwin, White & Prince v. Henneford* (1938), 305 U. S. 434, 438-439; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33.

is true whether New York does or does not levy an additional similar or substantial tax. In this case appellant was at disadvantage in competition on the New York Stock Exchange by the full amount of the tax, i. e., at $1.00 per $100.00 since the tax was at one per cent of the gross receipts from the sale. A New York owner of similar securities, of course, has that much advantage which is substantial in the case of stocks or bonds. This competitive disadvantage is in nowise alleviated if in New York the Indiana seller pays a tax which the local seller must also pay. The Indiana man goes into the market in any case one point down to the local man.

A "gross receipts tax on commerce" will always work discriminatorily against the interstate seller if the state of the seller or the origin of the commerce can impose the tax.[18] Heretofore it had been supposed that this was the real distinction between the *Adams* and the *Berwind-White* type of case.[19] Thus, if a tax in the state of the buyer or delivery affects all alike, interstate commerce is neither discriminated against nor unduly burdened. Just the reverse is true, even as to a tax levied on all taxpayers without discrimination, in state of origin, because that state cannot reach into the state of the buyer or delivery to equalize the tax burden. In this situation the interstate seller can look only to the commerce clause as interpreted and applied by this court to protect him

18. Of course, where the state of origin and the state of delivery are the same the commerce is local in character and the state may tax even though the buyer may reside outside of the state, and the goods may actually be transported outside of the state before delivery. Cf. *Department of Treasury v. Wood Preserving Corporation* (1941), 313 U. S. 62; *International Harvester Company v. Department of Treasury* (1944), 322 U. S. 340.

19. *Nippert v. Richmond* (1946), 326 U. S. ——; *McGoldrick v. Berwind-White Mining Co.* (1940), 309 U. S. 33, 57-58; *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167, 175.

from what in operation will always be a discriminatory situation in other states where he must compete for a market.[20]

Indiana does not go penniless even where a manufacturer does not under the *Adams* case pay on commerce moving out of the state. A taxpayer such as Adams pays on all local sales,[21] on all service transactions,[22] and on all income from investments.[23] In addition the very activity gives rise to another source of income for the state. All the raw materials purchased, whether purchased locally or from outside the state, bear the tax[24] and sums paid out for labor furnished are taxed under the Gross Income Law.[25] These latter taxes to the state of Indiana though paid in the first instance by the supplier and wage earner are a result of the existence of the

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20. The notion that Congress could or would settle the question of the application of state tax laws as applied to commerce is dispelled by a history of more than 150 years of inactivity in the field and by its abdication following the *South-Eastern Underwriters* decision where the application of Federal regulation was made clear. (Cf. 15 U. S. C. A., Section 1011, et seq.) Also compare the remarks of a member of this court in a concurring opinion where it was said:

"It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry." *Duckworth v. Arkansas* (1941), 314 U. S. 390, 400.

21. *Miles v. Department of Treasury* (1935), 209 Ind. 172; *Storen v. J. D. Adams Mfg. Co.* (1937), 212 Ind. 343.

22. *Department of Treasury v. Ingram-Richardson Mfg. Co.* (1941), 313 U. S. 252.

23. Cf. *Department of Treasury v. Muessel* (1941), 218 Ind. 250; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307.

24. Cf. cases footnote 18 supra, and *Department of Treasury v. Allied Mills* (1940), 220 Ind. 340.

25. Section 1(m), Chapter 50, Acts of Indiana 1933, as amended. Burns' Rev. Stat., Ind., 1933, Section 64-2601.

enterprise. In the final analysis the tax is reflected in the cost to Adams. So commerce, under a gross receipts law like Indiana's, pays its way.

B. *The Gross Receipts Tax May Be Levied By Other States.*

Search for a "taxable event" and seizure upon some local phase of a transaction to sustain the tax is not possible in this case.[26] The tax is upon "gross receipts" received in Indiana

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26. The case of *O'Kane v. State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905, relied on by the Indiana Supreme Court in its opinion in this case is an example of the distinction between a gross income tax like Indiana's and a tax levied on a particular event. In the *O'Kane* case a New York tax levied upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers" of shares of stock at the rate of 3 cents for shares of less than $20 sale price and 4 cents over that figure was upheld. The sales in question involved deliveries outside of New York State while the contract to sell was made and approved within the State. Four of the judges of the court felt that the tax was valid because:

"The taxable event, to-wit, the making of the agreement for the sale of the property, occurred in this State prior to the transportation of the goods in interstate commerce, and was an exercise of one of the incidents of ownership" (28 N. E. (2d) 909).

The statute did name a contract of sale as a taxable event. No such selection is made in the Indiana statute. It is simply a tax on gross receipts from commerce. The New York court distinguished the *Adams* and the *Gwin, White & Prince* cases, saying,

"The taxes there in question were held invalid because the taxable event was equally within the jurisdiction of States other than the one of origin and the one of destination, and hence the same event could have been taxed in each State through which the shipment passed if the levy had been sustained" (28 N. E. (2d) 909).

Three judges of the court dissented on the grounds that the effect of the New York tax was the same as the effect of the tax in the *Adams* case. The *O'Kane* case, if it is instructive at all in this case, demonstrates clearly (1) that the majority of the court was willing to go along because there was the selection of a local taxable event; (2) that the majority of the court felt that a tax such as the Indiana gross income tax could not be sustained; and (3) that the sales in this case of the shares of stock would have to pay in New York another tax, clearly indicating a multiple burden on the shares in question (R. 18-19). At the rate fixed in the New York law under the *O'Kane* decision the New York broker selling the shares would have to pay $140.55 in taxes.

from out of state pursuant to an interstate sale. Indiana has now abandoned all pretext and calls such a tax by its rightful name, a "tax upon gross receipts from commerce."[27] Such a tax is valid in the state of delivery,[28] but if Indiana as the state of origin may levy a "tax on commerce," why not also any other state where there is some incident of the commerce? Thus, if the taxpayer received or deposited the money in some other state could not that state also tax the full gross receipts? Or, why not also the state where a transfer agent might register the stock for transfer? Logically a "tax on commerce" could be applied in any state which offers some protection or sanction to any incident of the commerce.[29] The effect of such a tax is quite different from a tax on the *use* of an article,[30] or on *delivery* pursuant to a sale,[31] in the state of destination of the commerce. Only one state can lay claim to such a taxable incident. But "commerce" in its essence means that more than one state must have some claim to a local incident of the commerce, and a "tax on commerce" is thus capable of levy wherever the commerce touches any state.

Any tax such as Indiana's, when applied to more than use or delivery, opens commerce to multiple burdens. In the long

27. See note 3, page 4 supra.

28. See cases note 18, page 14 supra.

29. "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax." *Nippert v. Richmond* (1946), 326 U. S. ——.

30. *Monamotor Oil Co. v. Johnson* (1934), 292 U. S. 86; *Southern Pacific Co. v. Gallagher et al.* (1939), 306 U. S. 167; *Felt & Tarrant Co. v. Gallagher et al.* (1939), 306 U. S. 62; *Nelson v. Sears, Roebuck & Co.* (1941), 312 U. S. 359; *Nelson v. Montgomery Ward & Co.* (1941), 312 U. S. 373; *General Trading Co. v. State Tax Commission* (1944), 322 U. S. 335; cf. as to a compensating tax, *Henneford v. Silas Mason Company, Inc.* (1937), 300 U. S. 577.

31. *McGoldrick v. Berwind-White Mining Co.* (1940), 309 U. S. 33.

run the interest of the states is served if one, but only one, state may tax commerce.[32] Commerce is protected from laws discriminatory in operation and from multiple burdens if, and only if, as in the past this court holds to the principal that the one state which may tax is the state of the buyer or delivery. It is only in this state that competitive equality may be maintained and discrimination avoided by a tax upon both local and interstate commerce.

Question 3

Domicile and Situs Have No Effect Upon the Commerce Question

Domicile and business situs are legal concepts of concern in cases involving conflicts between states claiming jurisdiction to tax intangible property. The right to levy property,[33] transfer,[34] and succession taxes[35] has been justified by the applica-

32. The Attorney General argues that to hold that Indiana cannot tax here would concentrate the power to tax such transactions in New York (Appellee's Brief, page 18). But this argument overlooks three things: (1) there are other large markets in Chicago, Detroit, Philadelphia, Pittsburgh, St. Louis, Cleveland, San Francisco, Cincinnati, Boston and Salt Lake City and many other cities, including Indianapolis, have over-the-counter markets; (2) after all it is New York that has jurisdiction to protect the sale because title passes there; (3) Indiana does impose a tax upon all residents for the privilege of selling, assigning or owning intangibles at the rate of twenty-five cents per $100.00 which is collected not only upon each act of transfer but annually upon the owning of such property, Chapter 81, Acts of Indiana 1933, Burns R. S. 1933, Section 64-901, et seq. How substantial the tax on intangibles is appears from footnote 5, page 7 supra.

33. *Fidelity & Columbia Trust Co. v. Louisville* (1917), 245 U. S. 54.

34. Domicile of the owner was held sufficient to give the domiciliary state power to tax a transfer of intangibles though the evidences were kept outside the state. *Central Hanover Bank & Trust Co. v. Kelly* (1943), 319 U. S. 94.

35. The leading case where the whole problem is discussed is *Curry v. McCanless* (1939), 307 U. S. 357; Cf. also *Graves v. Elliott* (1939), 307 U. S. 383.

tion of one or the other of these concepts. Where intangibles have acquired a situs apart from the domicile of the owner, rival claims by the states of domicile and situs are made, and the taxpayer asserts protection under the due process clause.

We are not here troubled by such questions of dual location for tax purposes. The domicile of the owner of the legal title of the securities was in Indiana and so also was the physical location of the evidences of the intangibles, namely, the stock certificates and the bonds, prior to sale. Indiana admittedly had jurisdiction to impose property taxes and in fact did so.[36] No due process question is raised.

So far as we are aware this court has never passed upon the application of the two concepts of situs and domicile to gross receipts taxes or sales taxes upon the gross proceeds from interstate sales. A question is raised on this point under the commerce clause. The due process cases are of no assistance on this point. Here, if appellant is correct that intangibles are subjects of commerce then admittedly more than one state is immediately involved and the question is whether in the interest of the free movement of such commerce any restrictions are to be found in the constitutional grant to Congress to regulate commerce. Situs, domicile, and due process cases provide no key to unlock that problem.[37]

The State Court in sustaining the tax did not discuss the problem but took the position that the situs of the securities remained at the domicile of the owner in Indiana until owner-

36. Cf. notes 5 and 32, pages 7 and 18. The Indiana intangibles tax is a privilege tax levied in lieu of property taxes. *Lutz v. Arnold* (1935), 208 Ind. 480.

37. Cf. the concurring opinion in a situs, domicile, due process case where four members of this court declared:

"Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government." *Newark Fire Insurance v. State Board of Tax Appeals* (1939), 307 U. S. 313, 324.

ship passed to the purchasers and that the activities of the brokers acting for appellant "did not change the situs" of the securities (R. 35). This ignores the facts. *The very essence of each sale was a change of situs of the securities.* This occurred when the ownership in the securities passed to the purchaser. This occurred in New York when the broker there acting for the Richmond broker delivered the securities to the broker acting for the purchaser.[38] It was this delivery which completed the sale and gave rise to the gross receipt taxed. It depended upon a train of events both before and after delivery, all of which involved transactions across state lines—(1) an offer to sell by wire Indiana to New York; (2) an acceptance of the offer New York to Indiana preceded by a purchase order from some state other than Indiana to New York; (3) delivery of the securities by mail from Indiana to New York followed by delivery from New York to some state other than Indiana to the purchaser; (4) delivery of checks from New York to Indiana of the purchase price and a check in payment from some state other than Indiana to New York; and (5) all conducted through the media of an exchange which is the vortex of such commerce with all of the states.

If these transactions were not in commerce while the sum of such transactions through an exchange are clearly commerce then meaning of that word is as variable as the colors of a chameleon. And there is about as much substance to the

38. It was the passage of title in New York which gave rise to the receipts taxed. Indiana cannot project its power to tax beyond its boundaries and into New York. This court recently declared in a case involving an Arkansas sales tax sought to be applied to goods shipped into the state from Tennessee where title passed in that state that, "We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." *McLeod v. Dilworth Co.* (1944), 322 U. S. 327, 330.

concept of what is commerce as the diet on which the reptile for a long time was believed to live—namely, air.

If the gross receipt which is the thing here taxed did not arise from commerce it is only because the receipt gets its color, chameleon-like, from some part of the picture to which the state would attach it,[39] since the whole picture of the transaction from which the gross receipts arose was clearly interstate in character.

Conclusion

We respectfully submit a *gross receipts tax on commerce* may not be sustained on the sales of intangibles under the circumstances in this case,[40] because the tax has the threat of an undue multiple burden on such commerce and in the fact works discriminatorily against such commerce.

Respectfully submitted,

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39. In a case involving the due process clause this court declared:

"We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impo[illegible] state power because state power has nothing on which to ope[illegible] These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one." *Wisconsin v. J. C. Penney Co.* (1940), 311 U. S. 435, 444. The reverse must also be true. Such tags as situs cannot determine the power of a state to tax commerce.

40. The tax, since it is a tax levied on commerce without apportionment, is of the type traditionally condemned by this court. The

(40. Continued)

point has not been argued in this brief since it was not within the scope of the questions to which the brief was to be addressed. However, the following cases are typical: *Philadelphia & S. M. S. S. Co. v. Pennsylvania* (1887), 122 U. S. 326; *Leloup v. Port of Mobile* (1888), 127 U. S. 640; *Galveston, H. & S. A. R. Co. v. Texas* (1908), 210 U. S. 217; *Meyer v. Wells, Fargo & Co.* (1912), 223 U. S. 298; *Crew Levick Co. v. Pennsylvania* (1917), 245 U. S. 292; *Cudahy Packing Co. v. Minnesota* (1918), 246 U. S. 450; *United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321; *Sprout v. South Bend* (1928), 277 U. S. 163, 171; *New Jersey Bell Tel. Co. v. State Board* (1930), 280 U. S. 338, 349; *Cooney v. Mountain States Tel. & Tel. Co.* (1935), 294 U. S. 384, 392-393; *Matson Navigation Co. v. State Board* (1936), 297 U. S. 441, 444; *Pacific Tel. & Tel. Co. v. Tax Commission* (1936), 297 U. S. 403, 412-413; *Fishers Blend Station v. Tax Commission* (1936), 297 U. S. 650, 655, 656; *Puget Sound Stevedoring Co. v. Tax Commission* (1937), 302 U. S. 90; *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 3

GAIL P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT H. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

ADDENDUM TO ORAL ARGUMENT

The question asked by Mr. Justice Rutledge near the close of the appellant's argument was not answered as directly nor as clearly as it might have been. The question was, "What happens to your economic argument if every state

should have a gross income tax law just like Indiana's?"

The answer obviously is that if the Berwind-White case is applicable so that the state of destination may tax and the State's argument in this case should prevail thereby permitting the state of origin to tax also, then interstate commerce would always pay double while local commerce paid but once. The supposed case of a like tax in every state proves the economic argument because in that situation interstate commerce is always at a disadvantage since it always involves more than one state and more than one tax.

Harry T. Ice,
Attorney for Appellant.

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Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40 [redacted] 3

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,
Appellant,
v.
GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,

Appellant,

v.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLEE

THE OPINION BELOW

The Circuit Court of Wayne County, Indiana, delivered no opinion; its final decree is found at R. 9-10. The opinion

of the Supreme Court of Indiana is found at R. 30-35: It is reported in 221 Indiana 675, and has been reported in 51 N. E. (2d) 6. A copy of the opinion is also set forth in Appendix 2, *post*, p. 21.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on October 25, 1943 (R. 30). Appellant's petition for a rehearing in that court was overruled on November 22, 1943 (R. 39). Appellant's petition for appeal, appeal bond, citation with proof of service, and praecipe for transcript of record were filed and the Court's order allowing the appeal was entered on February 17, 1944 (R., 39-43). This court noted probable jurisdiction on April 3, 1944 (R. 46). The jurisdiction of this Court rests on section 237 of the Judicial Code. (28 U. S. C. 344.)

QUESTIONS PRESENTED

Appellant, trustee of a testamentary trust created by a resident of Indiana and himself a resident of that State, acting through New York Brokers and their Indiana correspondent, sold stocks and bonds upon the New York Stock Exchange in the usual and customary manner to persons resident outside of Indiana. The State of Indiana, acting through the appellee as its administrative officer, levied a tax upon appellant as such trustee measured by his entire gross receipts, including those received by such sales of securities. The questions are:

1. Whether the commerce clause of the Constitution of the United States requires that receipts from sales of securities upon a stock exchange in another State be ex-

cluded from the measure of a State tax levied upon a resident of the State and measured by his entire gross receipts. The record is silent as to the payment of any tax in any other state upon such transactions.

THE STATUTE AND REGULATIONS INVOLVED

The statute involved and the pertinent regulations applicable thereto are set out in Appendix "A" and "B" of the Appellant's Brief, and Appendix 1 of this Brief.

STATEMENT

The facts as stipulated by the parties have been fully and fairly stated by the appellant in his Brief. (Pages 3-8.)

SUMMARY OF ARGUMENT

I

The case of *J. D. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307 and the cases following it are inapplicable to this case. The record does not disclose that appellant paid any tax upon this transaction in any other state.

II

This court has permitted a state to tax gross receipts from sales of tangible personal property whenever that tangible personalty has a physical situs in the state at the time the sale was consummated by delivery. The sale being an exercise of a right of property, this is in accord with the decisions of this court permitting property taxation of

tangible goods at their physical situs, which is also their legal situs.

Intangibles have a legal situs at the domicile of their owner and, by analogy to the cases permitting the taxation of receipts from the sales of goods, the receipts from the sales of intangibles would be taxable at the situs of such intangibles when the sale is consummated. In other words, appellant was properly taxed by Indiana upon the exercise of a right in property having a situs within the state.

III

It is not disputed that intangibles may be subjects of interstate commerce. However, the present tax does not discriminate against interstate commerce and, being levied upon a local event separate and apart from that commerce, it does not constitute an interference with it. Therefore, it is not prohibited by the Commerce Clause of the Constitution.

IV

The present tax was levied upon the local contractual aspect of intangibles and in no sense affected the national interest in the business of trafficking in such intangibles. Appellant dealt entirely in the local market maintained by and resulting from the national organization of brokers and stock exchanges which themselves conduct the interstate traffic in intangibles. To hold otherwise would dislocate the fiscal affairs of the states by concentrating the taxing power in those very few states in which securities exchanges are located.

The balancing of national and local interests requires that intangibles be taxed at their situs.

ARGUMENT

Appellant presents his case upon the basis of four premises or propositions which the appellee will discuss in the same order as they are presented in the brief for appellant.

I.

Primarily upon the basis of *J. D. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, appellant argues that the Gross Income Tax Act of 1933 is unconstitutional and void as applied to receipts from sales of commodities by residents of Indiana to residents of other states. Appellee contends that this statement is neither accurate nor applicable to this cause.

The rationale of the Adams case, if not repudiated by this court, is at least subject to serious question. One major premise of that case was that the interstate features of the transactions involved were exposed to the danger of a multiplicity of taxes by the several states in which the component parts of the commerce occurred. This premise no longer exists. In *McLeod v. Dilworth Co.* (1944), 321 U. S. —, the facts were practically identical with the facts in the Adams case. This court held that the state of the purchaser could not levy a tax upon the sales involved thus eliminating any danger of a multiplicity of taxes. In *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. —, this court specifically held that where the record discloses no tax upon the same event by another state the mere possibility of such a tax will not invalidate the tax already levied and that as to the invalida-

tion of a tax by reason of a multiplicity of levies "* * * it will be time to cross that bridge when we come to it."

In the case at bar, the record does not disclose that any other state has levied a tax upon the sales of intangibles the income from which was taxed by Indiana. In fact, the record discloses that the only deductions from the gross sales price of the intangibles were "commission, cost of revenue stamps, postage, and any other expenses of sale." (R. 20.) And there is no contention that any other state did actually levy a tax upon such sales. Since the mere possibility of multiplicity of taxes is no longer to be considered as an invalidating factor, this rationale of the Adams case is not here applicable.

It is the further contention of the appellee that in *Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, 310-11, this court erroneously rejected the characterization by the Indiana Supreme Court of the Indiana Gross Income Tax as a tax upon residents based upon the privilege of domicile. Instead, this court described the tax as "* * * a privilege tax upon the receipt of gross income * * * a tax upon gross receipts from commerce." The tax upon residents of the state although levied in the same act is a separate and distinct tax from the tax upon non-residents. (Appellant's Brief, Appendix A, p. 45.) The former is levied upon the "receipt of the entire gross income of all persons resident and/or domiciled in the state." The latter is levied "upon the receipt of gross income derived from activities or businesses or any other source within the state" of non-residents. Thus, two taxes are levied upon different classes of taxpayers and upon different bases.

As to residents of Indiana, the tax is levied upon all receipts received from out-of-state sources except receipts

from businesses having a legal situs outside the State. (Sec. 1 (m), Appendix 1, p. 20, post.) Thus, wages earned outside the state, receipts from contracts performed outside the state, and receipts from other activities localized in other states are taxed and such tax can only be levied upon the basis that the recipient is domiciled within the state. Non-commerce receipts such as alimony, and damages for injury to the person and property are taxed so that the tax is not conditioned upon the engagement in commercial and business activities; it is conditioned solely upon the receipt of money by a resident of Indiana from any geographical source whether that money be produced by a commercial activity or not.

Under such circumstances the dissenting opinion in that case very properly distinguished the tax from those taxes previously condemned which were levied solely upon those who engaged in a certain business by reason of their engagement in that business.

The majority opinion distinguished between a gross income tax and a net income tax but such distinction is a distinction in degree and not in kind. Thus, the federal income tax appears to be progressing gradually by a reduction in allowable deductions from its original concept toward a gross income tax. The victory tax is an example of such progression. The tax on income in lower brackets is another such example. It is difficult to say at what point in the elimination of such deductions the nature of the case will be changed from a net to a gross income tax.

It has been indicated at times that the distinction between the two taxes is that the net income tax is based on the ability to pay while the gross income is not. Such a distinction neglects the fact that either profit or volume are

imperfect yardsticks of ability to pay and neglects other criteria of taxation completely. Thus, there is the principle that a taxpayer should pay taxes somewhat in proportion to values received from the state and that two businesses of an identical nature and of equal volume equally avail themselves of the protection afforded by the state whether each is equally profitable or not.

It is the contention of the State of Indiana that where it levies a tax upon those residents solely by reason of their domicile and measures that tax by the volume of their total activities as that volume is expressed in the receipts from those activities, such tax being levied equally upon all without any discrimination, the mere fact that a portion of that measure may be derived from activities in interstate commerce does not invalidate the tax any more than would be the case if the tax were measured by net income, a portion of which measure arose from activities in interstate commerce.

The applicability of *J. D. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, to sales of intangibles as distinguished from sales of commodities will be later discussed. The principles here contained are that, as later modified and possibly even repudiated, the premises upon which that case was decided can no longer be said to be sound and that case is of very doubtful authority. The other cases upon which appellant relies in the first portion of his argument which follow the Adams case partake of the same infirmities.

II.

The appellant next argues in substance that this court has held that where tangible property is sold in interstate

commerce the state of the buyer may tax but the state of the seller may not, and that this rule applied in this case would require that the tax imposed upon appellant be invalidated.

It would appear that appellant has misconstrued the decisions of this court. Two cases decided at the last term of this court appear to negative the rule for which appellant contends. In *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. —, the court had under consideration, among others, certain sales by a resident of Indiana to a resident of Ohio, delivery being made in Indiana. Indiana levied a tax upon its resident measured by the receipts from such sale. The court sustained this tax by the state of the seller. In *McLeod v. Dilworth Co.* (1944), 321 U. S. —, the court had under consideration a sales tax by the state of the buyer upon goods which were delivered to the buyer by delivery to a carrier outside the state and this court invalidated such tax by the state of the buyer. Any attempt to synthesize a simple rule from these cases in which are involved solely diverse situations of fact is sure to be difficult.

Tangible personal property is transitory and acquires a situs for purposes of property taxation at its physical location. The right to sell property or to receive income from the sale of property are two of the bundle of rights which together constitute the aggregate property right which is the subject of property taxation. It is but proper then to permit the part to be taxed where the whole may be taxed. This principle was stated in *McGoldrick v. Berwind-White Coal Min. Co.* (1940), 309 U. S. 33, 52.

> "• • • we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may

> be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements."

and this court has permitted taxation of sales and receipts from sales at the situs of the goods when the exercise of the right to sell was consummated by delivery of the goods to the purchaser or to the carrier as agent of the purchaser, whether such delivery was preceded by interstate commerce. (*McGoldrick v. Berwind-White Coal Min. Co.* (1940), 309 U. S. 33; *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. — (Class E Sales) or was followed by interstate transportation of goods; *Department of Treasury v. Wood Preserving Co.* (1941), 313 U. S. 62; *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. — (Class D Sales),

Conversely, a propery tax upon tangible personalty having a physical situs out of the state cannot be sustained upon the basis that the owner is domiciled within the state. *Union Transit Co. v. Kentucky* (1905), 199 U. S. 194, 204. Consistent with this rule are the cases denying the power of a state to tax the right to sell goods which have a physical situs outside the state at the time the sale is consummated by delivery to the purchaser or to a carrier as his agent. *McLeod v. J. E. Dilworth Co.* (1944), 321 U. S. —; *In re Globe Varnish Co.* (1940), 114 Fed. (2d) 916, aff'd. 312 U. S. 690.

Likewise, a tax on transfer of tangible personalty by inheritance can be levied solely by the state where such

tangibles have a physical situs at the time of such transfer. *Frick v. Pennsylvania* (1924), 268 U. S. 473. And a tax upon the use of tangibles must, of necessity, be laid by the state of physical situs at the time of such use. *General Trading Co. v. State Tax Com.* (1944), 321 U. S. —.

This principle would not, of course, affect an excise tax upon an activity not connected with the ownership of property such as the taxation of commissions of a selling agent not holding any interest in the goods. *Gwin, White & Prince, Inc. v. Henneford* (1938), 305 U. S. 434.

If this same reasoning be applied to the taxation of intangibles with a recognition of the fact that intangibles are considered to have a situs at the domicile of their owner, then the exercise of the right to sell such intangible or receive income from such sale is the exercise of a property right taxable at the situs of such intangible. The tangible personal property derives its situs from its physical location, whereas intangible personalty depends for its situs solely on the domicile of its owner, or from an established business situs. It is stipulated that appellant's domicile is in Indiana and that neither the appellant nor the estate of said Henry C. Starr, nor the appellant as Trustee, had or has a place of business at any point other than at Richmond, in Wayne Township, Wayne County, State of Indiana. (R. 17.)

III.

It would be futile, indeed, to dispute the well-established rule supported by the cases in Appellant's Brief and others that intangibles may be subjects of commerce between the states. It is possible to argue that Appellant's transactions in regard to his stocks and bonds did not constitute inter-

state commerce. Thus, in *Chicago Board of Trade v. Olsen*, (1922), 262 U. S. 1, 32, it was held that sales for future delivery on the Board of Trade in Chicago are not in and of themselves interstate commerce although they could be and were regarded by Congress from the evidence before it as directly interfering with interstate commerce. What was there said in regard to grain futures would apply equally to sales of other intangibles upon other markets.

However, invalidity of a tax is not established by merely showing that the tax is upon one of a chain of events which together constitute interstate commerce. As was said by this court in *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167, 177-8:

> "The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax upon its operations as such, is an interference. A tax upon property or upon a taxable event in the state, apart from operation, does not interfere."

Interstate commerce must bear its share of the tax burden along with intrastate commerce, but the state may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay.

It is not and cannot be claimed that the present tax discriminates against interstate commerce. It is levied equally and alike upon all sales of intangibles by a resident of the state whether such sales be entirely local in their execution or whether interstate commerce may intervene at some point in the chain of events. Nor can it be said that the tax is laid upon the operations in commerce as such. The tax is laid upon the receipt of money by a resident of

the state from the sale of property having situs within the state. In this respect, the sale of an intangible is more comparable to a sale of real estate than to a sale of tangible personal property. Assuming the existence of an interstate real estate exchange whereon a sale is made by residents of different states of a tract of unimproved land of which neither the buyer nor the seller takes actual physical possession and assuming that the deeds and other title papers pass by delivery from seller to buyer from one state to another in the mails, can it be denied that the state where the real estate is situated may tax the receipt by the seller of the money derived from such sale? Yet in that case as here the sole subject of the tax is the receipt of money from the sale of property having situs within the state. The situs of the property in each case establishes the situs of the property right which is taxed, such property right being the right to sell and receive the sale price of that property.

Thus, in *Rhode Island Hospital Trust Co. v. Doughton* (1926), 270 U. S. 69, 81, the court states:

> "In the matter of intangibles, like choses in action, shares of stock and bonds, the situs of which is with the owner, a transfer tax, of course, may be properly levied by the state in which he resides."

and in *Curry v. McCanless* (1939), 307 U. S. 357, 365:

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted

> through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. (Citations omitted.) Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership *or its exercise*—they cannot be disassociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities." (Italics supplied.)

It must be admitted that these cases arose under the due process clause and not under the Commerce clause, but it also must be conceded that they establish that the sale or other transfer of an intangible is, for the purposes of taxation, a local event within the state of the owner's domicile. Here the tax is levied upon that local activity apart from any operations in interstate commerce. It, therefore, falls within the description of those taxes which do not interfere with such commerce.

IV.

Appellant in his fourth sub-division of argument concedes that the situs of the securities here involved was at the place of his Indiana domicile, but, confusing his intangible rights with the tangible papers evidencing the rights, argues that the situs changed at the place where such papers were delivered.

The situs of an intangible is in no wise affected by the location of the physical evidence of the intangible rights. *Buck v. Beach* (1907), 206 U. S. 392, 402. In *Graves v. Schmidlapp* (1942), 315 U. S. 657, this court remarked:

> "Intangibles, which are legal relationships between persons and which in fact have no geographical location are so associated with the owner that they and their transfer at death are taxable at the place of his domicile, where his person and the exercise of his property rights are subject to the control of the sovereign power."

By a novation appellant's rights as a shareholder having a situs in Indiana were extinguished and new contractual rights having a situs elsewhere came into existence by the issuance of new stock certificates. The property right exercised by appellant, that is, the rights to receive and enjoy income from the securities, the right to liquidate them, the right to surrender ownership to another or to the corporation, the personal rights of the appellant which attach to his person and could not be disassociated from it, these personal rights were indissolubly bound to the appellant and to Indiana, the state of his domicile. They were enjoyed and exercised by the appellant under the protection of the laws of Indiana. Appellant, as Trustee, was an artificial legal creature of the laws of the State of Indiana. Aside from the laws of that state the trusteeship did not exist. Indiana taxes the exercise of these rights not through dominion over the property in regards tangible property but through dominion over the person which dominion is a local event within the state.

This court has very recently had occasion to distinguish between the local aspect of intangibles as contractual rights and the national aspect of those businesses which engage in interstate commerce in regard to those local contract rights. Thus, in *United States v. Southeastern Underwriters Association* (1944), 321 U. S. —, the court recognized the local character of insurance contract as such but never-

theless held that the business of trafficking in such contracts across state lines constituted interstate commerce subject to regulation by Congress. In the cases where this court has invalidated a tax upon interstate sales of goods, the taxpayer was, in each instance, the agency by which consumable and durable goods were distributed to the consumers. It was the agency for interstate distribution and the tax was laid upon such activities of distribution and thus was laid upon the interstate traffic. In the case at bar, the business of trafficking in stocks and bonds is conducted by brokers and this court has held that such business constitutes interstate commerce. It would seem that such a distinction between the national aspect of traffic in securities and the local aspects of the contractual rights which constitute the intangibles would not be affected by the technical consideration that the business of so trafficking in intangibles is conducted upon an agency basis rather than one of ownership. The very purpose and effect of this national organization for the purchase and sale of securities is to bring to the investor a market in his own locality where he can engage in the purchase and sale of securities. As a practical matter, the investor deals with his own local broker who is maintaining this local market. It is true that such local markets are geared to a few large markets of which the New York Stock Exchange is the largest but the entire brokerage system has grown up by reason of the necessity of establishing local markets and avoiding the necessity of having the investor do business directly and at long range upon metropolitan markets. The appellant placed orders in Indiana to sell from time to time the several stocks and bonds which he owned and he knew and intended that the same would be offered for sale according to the sales order, at the prices specified by him in his separate

sales orders. He was notified, as such Trustee, of the sale and endorsed and delivered to his broker in Indiana, the stock certificates or bonds so sold. He received the proceeds of such sale by check from his local broker in Indiana. (R., 19-20:31-32.)

The Congress has recognized that the national interests extend to those who are engaged in the business of trafficking in securities (U. S. Code, Title 15, Section 77 a, ff, Securities Act of 1933, Securities Exchange Act of 1933, Investment Companies Act). By exempting from their operation the transactions of the individual investor in the acquisition or the disposition of his investment it would seem that Congress has recognized the essentially local character of such transactions.

In the complexity of the ramifications of our commercial intercourse the distinctions between intrastate and interstate commerce offers no clearly defined line of cleavage. In each case, the necessity that the states be afforded an ample source of revenue and the necessity that the flow of national commerce be not impeded require that these considerations be balanced against each other. In *United States v. Southeastern Underwriters Association* (1944), 321 U. S. —, this court said:

> "In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated."

In view of the fact that the Congress after careful study and investigation has, by its action, indicated that

the national interests requiring regulation do not extend beyond those who furnish the markets, it is fitting and proper that this court, having no facilities for investigation and being not charged with the duty of such investigation, accept the judgment of that body.

This is especially true in this case where a judgment for the appellant would concentrate the power of taxation either in those very few states in which are located securities exchanges or in those very few states wherein the majority of those corporations issuing listed securities are incorporated. The national interests do not demand such a result. On the contrary, they condemn it. It cannot be said that a tax levied upon an investor by his own state, enacted by his representatives, and levied alike upon receipts from all of his securities whether listed upon an out-of-state exchange or not, will discourage his investment in such listed securities to the detriment of interstate traffic in such securities. It might well be said, however, that taxes levied by other jurisdictions where he is entitled to no representation of which he may have little or no knowledge would cause the investor to forego such investments and encourage him to invest locally, in which case he would have full knowledge of his ultimate tax burden to such an extent that he could compute his opportunities for profit.

Upon the basis of a balancing of national and local interests, it would appear that transactions of the individual for the purpose of investment or speculation be viewed as separate and apart from the traffic in interstate commerce conducted by the stock exchanges and the brokerage or organizations. Investment of and speculation with one's capital is essentially a local activity, separate and distinct

from commerce and the liquidation of an investment whether such liquidation be by sale or redemption is just that and no more. National interest does not require that such private investment be exempted from the control of the states.

CONCLUSION

Both from the standpoint that the sales of securities upon which appellant paid tax were sales of intangibles having a situs within Indiana and from a practical balancing of national and local interests, the conclusion of the Supreme Court of Indiana in this cause was correct and its judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

APPENDIX 1

Appellant in his Appendix A, pages 44 and 45 omits from Section 1(m) of the Indiana Gross Income Tax Act the following proviso which is believed to be pertinent:

> "Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are reecived from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto (including the disposal of capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business): Provided, further, That it is not the intention by the foregoing language to exclude from the definition of 'gross income' any receipts of a taxpayer received as interest or dividends, or from sales, or other receipts received from investments, which investments were acquired and/or disposed of other than in connection with the business in which such taxpayer is regularly engaged, nor shall this exclusion be construed as applying to salaries, wages, bonuses, commissions, or other personal remuneration of any kind or character received by any taxpayer."

APPENDIX 2

INDIANA SUPREME COURT

No. 27881

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA,

Appellant,

v.

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,

Appellee.

October 25th, 1943.

SHAKE, J. During 1940 the appellee, who was domiciled in Indiana, paid, under protest, Indiana Gross Income Taxes calculated on proceeds derived from the sale of corporate stocks and bonds of foreign corporations. Subsequently, the appellee brought this action and recovered the amount of taxes so paid. The State has appealed from the overruling of its motion for a new trial, which asserted that the decision was contrary to law.

The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation:

> "5. The sales of the above described corporate stocks and bonds were twenty separate sales made

from time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and

Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds according to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States Mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said

bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as a broker to procure sales thereof on or for commission. All of said sales were handled in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana."

The question presented by this appeal is whether the appellee is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933. § 64-2601 et seq., Burns' 1933, § 15981 et seq., Baldwin's 1934. Section 6 of that act exempts "So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States."

Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather a protection against such commerce being subjected to the onerous burdens of multiple exactions. "The validity of State regulation under the commerce clause is to be determined by the balancing of two considerations: that State government shall be able to derive revenue for its support, and that commerce among the States shall be unfettered by provincial impediments. Stated conversely, interstate commerce must bear its share of the tax burden along with intrastate commerce, but the states may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay. *O'Kane v. State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905.

Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected. *Dept. of the Treasury v. Allied Mills, Inc.* (1942), — Ind. —, 42 N. E. (2d) 34, affirmed by the United States Supreme Court February 15, 1943, — U. S. —, 87 L. Ed. —, 63 Sup. Ct. 666. *J. D. Adams Mfg. Co. v. Storen* (1938), 58 Sup. Ct. 913, 304 U. S. 307.

The situs of intangible property, such as stocks and bonds, is not of a transitory character. As to assets of this type there has been applied the rule of "*mobilia sequuntur personam*"—the situs of the property is the domicile of the owner. This doctrine maintains, generally in the absence of a statute or of peculiar facts forcing a different conclusion. Cooley, Taxation (4th Ed.), § 440. *Union Refrigerator Transit Co. v. Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36. *Buck v. Beach* (1906), 206 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732. *Blodgett, Tax Commissioner of the State of Conn. v. Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410. *Croop v. Walton* (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386. No such statute has been called to our attention and no such facts are disclosed by the stipulation. It must, therefore, be concluded that the situs of the stocks and bonds sold by the appellee was in this state, where he was domiciled. For a discussion of the circumstances that may establish for intangible property a situs different from the domicile of the owner see *Miami Coal Co. v. Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333.

The appellee concedes that the law is as stated above, but he relies upon the proposition that the sale of said securities, in the manner described by the stipulation, constituted transactions in interstate commerce. He leans upon the circumstances that the offers of sale, the acceptance of the offers, the delivery of the certificates evidencing ownership, and the remittance of the proceeds by the broker in New York to him in Richmond, Indiana, were effectuated by the facilities of interstate commerce. Having admitted the major premise, the appellee's contention must fail. If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until owner-

ship passed to the purchasers. The activities of the appellee's agents in making the sales did not change the situs of his securities any more than they affected his domicile. That said activities incidentally involved interstate commerce is immaterial. *Holland Furnace Co. v. Dept. of Treasury* (1943), — C. C. A. —, 133 F. (2d) 212.

The stipulated facts disclose a sufficient basis for imposing upon the appellee a tax measured by the gross income derived from the sales therein described. Whether the appellee's incidental activities in another jurisdiction might subject him to additional tax liabilities there is not before us; but even that contingency would not relieve him from the obligation he now seeks to avoid. *Curry v. McCanless* (1939), 307 U. S. 357, 83 L. E. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162. *O'Kane v. State, supra.*

The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLEE'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CASE

and

ADDITIONAL PROPOSITIONS, POINTS AND AUTHORITIES

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IN THE

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No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

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GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLEE'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CASE

and

ADDITIONAL PROPOSITIONS, POINTS AND AUTHORITIES

This case is before the Supreme Court of the United States on appeal from the Indiana Supreme Court. Oral argument (Summary Docket) was made before the Court

by both parties on November 8, 1944. No decision was made or rendered by the Court on that argument.

In the interim,[1] this case was restored to the docket on June 18, 1945 for reargument in its Journal for October 8, 1945, the Supreme Court of the United States propounded three questions to counsel, and directed that briefs and arguments be addressed thereto.

Statement of Record

The Appellant in its brief on the questions propounded for reargument of the cause, states portions of the record at pages 1, 2 and 3 of its brief. These abstract statements from the record, insofar as they go, are fairly and accurately stated. However, the Appellee points out three statements not stated in Appellant's brief, which could have a direct bearing upon the situs of the sale in this case, which statements are as follows:

> "• • • The trustee placed orders (twenty order transactions) to sell from time to time, of the several stocks and bonds • • • with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a

1. Since the argument before this Court, Gath P. Freeman, Trustee under the Will and of the Estate of Henry G. Starr, deceased, and also attorney of record for appellant, died on June 4, 1946. Thereafter, Almira G. Freeman, widow of Gath P. Freeman, was named successor trustee. On July 20, 1946, the successor trustee, Almira G. Freeman, was approved by the Circuit Court of Wayne County, Indiana, and is now the duly acting and qualified successor trustee. A motion for substitution has been presented and filed in this Court.

The Appellee recognizes the motion, offers no objection and acknowledges notice of such substitution. Appellee also takes notice of change of attorney for the Appellant from Gath P. Freeman to Harry P. Ice, of Ross, McCord, Ice and Miller, Indianapolis, Indiana.

stock and bond brokerage business at and in said City of Richmond, Indiana." (R., p. 19.)

"* * * The trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner & Beane, brokers at and in the City of New York of the State of New York and by them placed and offered on said New York Stock Exchange." (R., p. 20.)

"* * * Nor did the Trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana." (R., p. 21—Last clause in sentence—Stipulation No. 5.)

Appellee's Answer to Appellant's Discussion of "The Basis of the Tax".

Before answering the three questions propounded by the Court, which are later discussed on pages 9 to 16, we wish to answer the Appellant on the subject-matter in his brief designated as "The Basis of the Tax". (Pages 4-6, Appellant's Brief.) The Appellant raises anew the question as to what type of tax the Indiana Gross Income Tax is. We think the question as to the type, basis, effect and application of this tax has long been settled by both the Indiana Supreme Court[2] and the United States Supreme Court."[3]

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2. "We conclude that the tax in question is an excise levied upon those domiciled within the state or who derive their income from services within the state upon the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of the right to receive income from within, or transact business under the protection

In its comment upon the type of this tax, this court said in the Adams case:[3]

> "The regulation issued by the Department of Treasury pursuant to authority granted by the act treat the exaction as a gross receipts tax, and the Attorney General says in his brief that it is a privilege tax upon the receipts of gross income. We think this is a correct description."

And further said:

> "We conclude that the tax is what it purports to be, a tax upon gross receipts from commerce."

However, we respectfully suggest that the tax is more than a tax upon "gross receipts from commerce", for the reason that in its practical application it touches *all* gross receipts from *all* persons, some of whose receipts may not be from "commerce" at all in the generally accepted definition of the word "Commerce".

The Division's analysis of the Act has not been changed in its later Regulations. A discussion of the "Basis of the Tax" in the 1946 Regulation, quoted by Appellant (pages 4-5, Appellant's Brief) reveals no difference in tenor and

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of the state. We feel that the weight, reason and authority sustains this view." (Pages 172, 188.)

"The law is intended to be general and to operate on all residents of the State and all who derive revenue from sources within the State."

Miles v. Dept. of Treasury (1935), 209 Ind. 172; 298 U. S. 640; 209 Ind. 172; 199 N. E. 372.

3. *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 311.

effect between the analysis of 1946 and that published in the Regulations twelve years before (1934).[4]

We submit this comment to the Court as an answer to any inference which the appellant may imply that the nature or type of the Indiana Gross Income Tax Act effects, either directly or indirectly, the main question herein, i. e. Interstate commerce immunity, since it is undeniable that neither the nature of the tax nor the Court's analysis of it has been changed by legislative act or court decision. The question of the type or basis of this tax has been fully and

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4

GROSS INCOME TAX REGULATIONS.

Issued: July 1934.
Revised: Dec. 31, 1935.

ARTICLE 2

GENERAL SCOPE AND APPLICATION OF TAX.

"The GROSS INCOME TAX ACT of 1933 is primarily and in effect a gross receipts tax applying to the gross receipts of every taxpayer under the Act from all sources without allowances or deductions for costs, expenses or dependents, and is, therefore, in no way a net income tax. It applies to income from sales of all kinds of property or commodities in business and in this case is measured by the gross income derived from such sales. In this respect and to this extent it operates as a sales tax. There are not two separate and distinct laws in Indiana—that is, a gross income tax and a sales tax—but whatever elements of a sales tax there might be are embodied in and made a part of the gross income tax law."

4

GROSS INCOME TAX REGULATIONS

Approved: April 27, 1946.
Preface: Type of Tax.

"TYPE OF TAX. The Indiana Gross Income Tax is, in reality, a gross receipts tax. The coverage is the widest possible since the entire amount of gross receipts of taxpayers is used as a base. It is not a sales tax even though it applies to receipts from sales. It is not, however, imposed upon the act of sale but upon the receipts from sales when such income is received or credited. It is not an occupation tax because it is applied to every individual, group or firm without regard to the occupation thereof."

"It is not a consumer's tax because the act has no provision for passing the tax on as a separate chargeable item nor would such a provision be valid. (Opinion of Attorney General of Indiana, August 21, 1934)."

fairly determined and accepted by this Court in its consideration of eleven other cases involving this tax in interstate commerce matters, heretofore presented for the Court's consideration.[5]

Furthermore, the statement of appellant in his brief on reargument, on page 5, that "the court may disregard all argument predicated upon the proposition that this is a tax on the privilege of domicile, or any other privilege measured by gross income" is wholly presumptuous and minimizes decisions of the Courts which have heretofore held this to be a tax upon the privilege of receiving gross income.[6]

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5. *J. Harry Miles v. Department of Treasury of Indiana* (1935), 298 U. S. 640; 209 Ind. 172; 199 N. E. 372; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; 212 Ind. 344; 7 N. E. (2d) 941; *Wood Preserving Corp. v. Department of Treasury* (1941), 313 U. S. 62, 114 Fed. (2d) 922; *Ingram-Richardson Mfg. Co. v. Department of Treasury* (1941), 313 U. S. 252; 114 Fed. (2d) 889; *Allied Mills v. Department of Treasury* (1942), 318 U. S. 740, 220 Ind. 340; 42 N. E. (2d) 34; *Holland Furnace Co. v. Department of Treasury, Great Lakes Dredge & Dock v. Department of Treasury; Interstate Roofing & Supply v. Department of Treasury, Fitz-Simons & Connell Dredge & Dock v. Dept. Treasury* (1943), 320 U. S. 746; 133 Fed. (2d) 212; *Ford Motor Co. v. Department of Treasury* (1944), 323 U. S. 459; 141 Fed. (2d) 24; *International Harvester Co. v. Department of Treasury* (1944), 322 U. S. 340; 221 Ind. 416; 47 N. E. (2d) 150.

6. *J. Harry Miles v. Department of Treasury of Indiana* (1935), 298 U. S. 640; 209 Ind. 172; 199 N. E. 372; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; 212 Ind. 344; 7 N. E. (2d) 941.

Appellee's Answer to Appellant's Discussion of the Matter of Property Tax Collections and Intangible Tax Collections in Relation to Gross Income Tax Collections.

In addition to the above comment on the "Basis of the Tax", we also wish to comment on the Appellant's statement relating to the amount of 'property tax' and 'intangible tax' collections in the State of Indiana and to point out that the figures which would present a true comparison are not shown or quoted. The property tax collections for the years 1930, 1931, 1932 and 1933 when compared to the year 1934, reveal that there was a substantial reduction.[7]

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7. NET RECEIPTS FROM PROPERTY, INTANGIBLE, AND GROSS INCOME TAXES.*

For the Fiscal Year Ending: ***	Net Receipts Property Tax	Intangible Tax Net Receipts	Net Receipts Gross Income Tax	Closing Cash Balances **
Sept. 30, 1931, p. 91.	$143,438,784.71	None	None	
Sept. 30, 1932, p. 71.	135,421,445.18	None	None	
June 30, 1933, p. 130.	112,386,878.08	$ 633,889.67	$ 1,744,547.08****	
June 30, 1934, p. 9.	87,437,220.88	1,284,360.66	10,388,014.99	
June 30, 1935, p. 9.	95,575,961.18	1,085,571.21	13,607,836.05	
June 30, 1936, p. 7.	93,145,960.32	1,326,704.97	16,548,477.91	
June 30, 1937, p. 7.	99,688,926.18	1,507,312.42	20,556,656.33	
June 30, 1938, p. 7.	98,309,512.97	1,356,916.25	22,339,541.47	
June 30, 1939, p. 7.	99,473,099.05	1,251,282.53	19,981,967.58	
June 30, 1940, p. 7.	100,303,087.36	1,337,519.87	23,538,224.85	
June 30, 1941, p. 7.	105,421,704.10	1,534,179.97	25,872,790.17	
June 30, 1942, p. 7.	107,145,956.02	1,898,540.49	33,601,197.45	
June 30, 1943, p. 7.	108,729,685.30	1,496,981.30	34,116,866.36	
June 30, 1944, p. 7.	104,162,100.08	1,358,116.50	40,703,468.42	
June 30, 1945, p. 7.	111,079,966.40	1,408,308.25	46,157,549.79	

* Extracted from the Annual Statistical Reports of the State of Indiana, compiled by the State Board of Accounts. (Page reference are to statistical Reports.) Appellee's figures, in many instances, are less than corresponding

For the years subsequent to 1934, it is true that property tax has increased as shown by the Appellant's figures, but the property tax has not in any year reached the 1932 figure of $135,421,445.18. It is, of course, inevitable that the increased financial needs of the units of state government frequently necessitate increases in property tax assessments, but such increases are in every case held down by the amount of gross income tax annually distributed to these units. In other words, were it not for the distribution of the revenue collected by the gross income tax, the annual increase in property tax shown by the tables would, in every case, have been greater.

However, with respect to appellant's discussion of the economic effect of this tax upon the other state taxes, we believe that this subject is of no moment in relation to the main question in this cause, to wit: Interstate commerce immunity of intangibles.

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figures of Appellant, because Appellee's figures are *net*, after the deduction of refunds paid.

** Appellee neither sets out closing Cash Balances, nor accepts Appellant's figures in regard thereto, because (1) closing cash balances are not a true index of the financial status of Indiana for the reason that the cash balance presented in Appellant's Brief, reflects the financial status prior to payment of obligations and prior to the beginning of a new fiscal year, and, (2) the financial condition of Indiana is wholly irrelevant and immaterial to the issues of this case.

*** Appellant's Tax Table (p. 7 of Appellant's Brief on Questions Propounded for Reargument of Cause) is misleading, incomplete, and of no value in deciding the issue, because it does not show nor compare property tax receipts for years prior to the enactment of the Gross Income Tax Act in 1933.

**** Collections for May and June, 1933, at the inception of the Gross Income Tax Act; this figure taken from Year Book of the State of Indiana 1934, at p. 388.

THE QUESTIONS PROPOUNDED BY THE COURT

PROPOSITIONS, POINTS AND AUTHORITIES

Questions propounded by the Supreme Court of the United States:

1. WERE THE SALES OF SECURITIES AS MADE IN THE CIRCUMSTANCES OF THIS CASE, INCLUDING THE TRANSACTIONS UPON THE NEW YORK STOCK EXCHANGE, INTERSTATE SALES WITHIN THE MEANING AND APPLICATION OF ADAMS MFG. CO. v. STOREN, 304 U. S. 307; OF McGOLDRICK v. BERWIND-WHITE COAL MINING CO., 309 U. S. 33, 58?

PROPOSITION NO. 1

(Directed to Court's Question No. 1)

The sales of these securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, were not interstate sales within the meaning and application of the cases mentioned in the question. Intangible personal property requires consideration of a rule entirely different from the rules applicable to tangible personal property.

In this case, interstate commerce was only incidental, while in the J. D. Adams Mfg. Co. v. Department of Treasury, and the McGoldrick v. Berwind-White cases, the mobile situs of the tangible property called for a different reasoning.

The answer of Appellee to Question No. 1 is "No."

Point 1

The sale of securities in this case is not within the interstate commerce immunity, within the meaning and application of *J. D. Adams Mfg. Co. v. Storen; of McGoldrick v. Berwind-White Coal Mining Co.* The transactions involving intangibles are subject to different rules from the rules applicable to tangible personal property.[8]

Point 2

The property concerned in the *J. D. Adams Mfg. Co.* and the *McGoldrick cases* was tangible personal property capable of acquiring a situs in another state through the channels of interstate commerce *prior* to sale. In this case, the situs of the intangible property remains at the domicile of the seller (owner) until *after* the sale. This is a distinction which creates a difference.[9]

Point 3

The interstate commerce feature in this case is confined to transportation of the securities, which is only incidental and subsequent to the sale.[10]

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8. *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33; *Curry, State Tax Comm. etc. v. McCanless, Comm.* (1939), 307 U. S. 357; *Graves, et al. v. Elliott, et al.* (1939), 307 U. S. 383; *Safe Deposit & Trust Co. v. Virginia* (1929), 280 U. S. 83.

9. *Graves et al. v. Elliott, et al.* (1939), 307 U. S. 383; *Safe Deposit & Trust Co. v. Virginia* (1929), 280 U. S. 83; *Hatch v. Reardon* (1907), 204 U. S. 152; *Hall v. Geiger-Jones* (1916), 242 U. S. 539-558 (and cases cited there not in disaccordance); *Blodgett v. Silberman* (1928), 277 U. S. 1, 10; *Buck v. Beach* (1907), 206 U. S. 392-402.

10. *Ingram-Richardson* (1941), 313 U. S. 252; *McLeod v. Dilworth* (1944), 322 U. S. 327; *Hall v. Geiger-Jones* (1916), 242 U. S. 539-558.

Point 4

Neither the purchaser's state, nor the state which contains the Exchange Mart, could impose a tax upon the Appellant's gross receipts for the reason that the intangibles had acquired no business situs in such states, which would provide the only legal basis for a tax upon such gross receipts. In the absence of a business situs it is conclusive that the situs was the domicile of the owner.[11]

Point 5

The sale of these securities by the Appellant created a debt due him, which was taxable to him at his domicile.[12]

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2. Does the commerce clause forbid Indiana to levy gross income tax upon the transactions in question in the absence of any showing that a similar or substantial tax is, or may be in fact, laid upon them by any other state?

PROPOSITION NO. 2

(Directed to Court's Question No. 2)

The Commerce Clause of the Constitution does not bar a state from imposing a tax upon subject-matter under its jurisdiction in cases where such subject-matter is not burdened by the exactions of other states to the extent that interstate transactions would bear a heavier tax than that imposed upon local intrastate transactions. Furthermore,

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11. *Kirtland v. Hotchkiss* (1879), 100 U. S. 491.

12. *Kirtland v. Hotchkiss* (1879), 100 U. S. 491.

there is no rule of immunity against double taxation of intangibles. Even had the record shown in this case that a similar or substantial tax was in fact laid upon these securities by any other state, the Commerce Clause would not bar Indiana from levying a gross income tax.

The answer of Appellee to Question No. 2 is "No."

POINT 1

Interstate commerce should not be relieved from bearing its share of local tax burdens to the extent that they are borne by intrastate commerce. A forbidden burden does not exist unless a tax lends itself to a compounding of a burden greater than that imposed on intrastate transactions.[13]

POINT 2

The record herein does not show that any tax of a "similar" or "substantial" nature was imposed upon the appellant's gross receipts by any other state.[14] Even were a "similar or substantial" tax imposed by another state upon the receipts from the sales of these intangibles, such a circumstance would not bar or preclude Indiana's right to impose this tax. There is no longer any rule of immunity against double taxation of intangibles by the several states.[15]

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13. *International Harvester Co. v. Department of Treasury* (1944), 322 U. S. 340-349; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 46, 48.

14. Record: Stipulation and Evidence, Pages 12-21.

15. *State Tax Commission of Utah v. Aldrich et al.* (1942), 316 U. S. 174, 179; *Ft. Smith Lumber Co. v. Ark.* (1920), 251 U. S. 532, 533; *Cream of*

Point 3

Local transactions of this nature, where the seller and purchaser are both in Indiana, must bear this tax without question.[16]

Point 4

The interstate communication and transportation between the buyer and seller could not, of themselves, warrant or justify any other state imposing a tax upon the gross receipts of the seller.[17]

Point 5

The tax imposed upon the appellant in this case, created no discrimination against either interstate or intrastate commerce, nor did it place either at a competitive disadvantage.[18]

Point 6

The New York State Transfer Tax, even though it may have been exacted from the Appellant; is not to be considered as one of compounded or multiple taxes to the extent

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Wheat v. Grandforks (1920), 253 U. S. 325; *Ill. Central R. R. Co. v. Minn.* (1940), 309 U. S. 157, 164; *Kidd v. Ala.* (1903), 188 U. S. 730.

16. Sec. 3 (g) Indiana Gross Income Tax Act; Regulation 3500 Series VI, Rule 7; Regulation 4100, Series VII, Rule 7. (Also see foot note 25.)

17. *Ingram-Richardson, Mfg. Co. v. Dept. Treasury* (1941), 313 U. S. 252; 114 Fed. (2d) 889; *Western Live Stock et al. v. Bureau of Revenue* (1938), 303 U. S. 250, 258, 260; *Hall v. Geiger-Jones* (1916), 242 U. S. 539, 558.

18. Virginia Law Review, Vol. 26, p. 1938.

that it constitutes a vice of double taxation, for the reason that such tax is neither "similar nor substantial."[19]

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3. TO WHAT EXTENT, IF ANY, IS INDIANA'S POWER TO TAX THE GROSS RECEIPTS FROM THESE TRANSACTIONS AFFECTED, UNDER THE COMMERCE CLAUSE, BY THE FACTS THAT DOMICILE OF THE SELLER OR SITUS OF THE SECURITIES PRIOR TO THE CONCLUSION OF THE SALES WAS IN INDIANA?

PROPOSITION NO. 3

(Directed to Court's Question No. 3)

That fact that the domicile of the seller and situs of the securities prior to and at the time of sale was in Indiana, fortifies and insures Indiana's power to levy a tax upon the seller's gross receipts from this type transaction. The rule of mobilia sequuntur personam prevails.

The answer of Appellee to the Court's Question No. 3 is, therefore, that domicile and situs do have a material effect

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19. New York State Law, Article 12, Sec. 270, Thompson's Laws of New York, CL New York, provides that the rate of transfer tax shall be 3c on each share sold for less than $20.00, and 4c on each share sold in excess of that amount. A comparative example is as follows: 100 shares, selling price $100.00 each, would compute a gross income tax of $100.00 under the Indiana law. The New York tax, if leviable, would be $4.00.

A New York Transfer Tax is in no way similar to the Indiana Gross Income Tax for the reason that under the former it is not necessary that a sale occur; it attaches when title passes, even though the transfer is purely a gift, bequest or inheritance. It has no relation to the gross receipts of the seller except to the maximum of $20.00. It is not a tax upon receipts, nor the privilege of receiving them. It is, instead, a tax upon a physical act—the act and privilege of transferring title on the books to intangible property and of thus using the facilities of the New York Stock Exchange.

upon the application of the Indiana Gross Income Tax Act in this case.

Point 1

The rule of mobilia sequuntur personam, while a common-law rule, has been sustained by this Court and must be regarded as settled.[20]

Point 2

The sovereign State of Indiana, having control and jurisdiction over the appellant and his securities, had adequate constitutional basis for imposing this tax.[21]

Point 3

Under the general principles of taxation, intangibles are taxable at the domicile of the owner and not elsewhere.[22]

Point 4

The lack of a "business situs" elsewhere forces the conclusion that the situs of these intangibles was at the domicile of the owner.[23]

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20. *Blodgett v. Silberman* (1928), 277 U. S. 1, 9 and 10; *Graves v. Schmidlapp* (1942), 315 U. S. 657-660.

21. *M'Culloch v. Maryland* (1919), 4 Wheat. 316-429; *Curry v. McCanless* (1939), 307 U. S. 357; *Graves v. Elliott* (1939), 307 U. S. 383; *Graves v. Schmidlapp* (1942), 315 U. S. 657-660.

22. *Kirtland v. Hotchkiss* (1879), 100 U. S. 491, 497, 498 and 499.

23. *Safe Deposit & Trust Co. v. Virginia* (1929), 280 U. S. 83-92; *Wheelock-Lovejoy & Co. v. Gill* (1937), 366 Ill. 378; 9 N. E. (2d) 58; *Wisconsin v. J. C. Penney Co.* (1940), 311 U. S. 435, 436; *Wheeling Steel Corp. v. Fox, et al.* (1936), 298 U. S. 193-197.

Point 5

These intangibles are nothing more than constituents of title and evidences of ownership of interest in corporate property. The removal of stock certificates from one stock to another does not change the actual situs of the physical corporate assets which they represent.[24]

Point 6

The State of Indiana, through its Gross Income Tax Division (Department of Treasury) in the absence of any showing of "business situs" applies the rule of mobilia sequuntur personam consistently, equally and alike to both residents and non-residents.[25]

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24. *Hatch v. Reardon* (1907), 204 U. S. 152-161.

25. "ARTICLE 39. REGULATION 3904. INTANGIBLES OWNED BY NON-RESIDENTS. The Gross Income Tax Division applies the rule of *mobilia sequuntur personam* (the situs of the intangible is the domicile of the owner) as to income received from the sale of intangibles; interest or dividends thereon; or receipt of distributions thereon in dissolutions of corporations. Therefore, the tax will not apply to the income of non-residents received from such sources. (Series VII (1946) Gross Income Tax Regulations.)

"ARTICLE 41. REGULATION 4100. RESIDENTS OF INDIANA—RULE 7. SALES OF INTANGIBLE ASSETS. Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property, even though the sale is made outside the state. This will include receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations. This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. (Series VII (1946) Gross Income Tax Regulations.)

ARGUMENT

This case presents two questions for determination by this Court:

1. Whether or not the sale of securities between residents and non-residents of the State of Indiana, whereby the telegraph, mail and the services of a foreign mart are used, constitutes an interstate transaction immune from taxation within the meaning of the Federal Constitution, and

2. If we are to assume that the foregoing transactions are transactions in interstate commerce, then does the application of the Indiana Gross Income Tax Act burden, regulate, interfere with, or discriminate against such commerce contrary to the Commerce Clause of the Federal Constitution?

The Appellee contends that there are no constitutional reasons for prohibiting Indiana from imposing the gross income tax upon the gross receipts derived from the sale of securities in this case.

The situs of these intangibles was at the domicile of the owner in Richmond, Indiana, and remained there until *after* the sale was completed. The transportation of the securities to New York thereafter was not the "very essence of sale" as the Appellant says. It was incidental and involved interstate commerce only as to *transportation* after the sale was made.

The Appellant has, to a great extent, built his case upon the foundations of the J. D. Adams decision.

We think that it does not apply in the present case for the very obvious reason that in legal principles there is a

tremendous difference between tangible and intangible property. The former is capable of acquiring a situs in another state prior to sale and entering into competition with other tangible property upon its arrival there. Intangible property retains its situs at the seller's domicile until it acquires a definite new one. Furthermore, intangible property is not a competitive thing which competes with local trade. Any favorable inclination toward the "state of market" would, therefore, be inappropriate here.

The theme of the J. D. Adams decision is that the risk of taxation by the state of destination innoculates this tax with "vice". But we submit that the mere fact that the state of destination may impose a tax upon gross receipts from the sale of *fangible* property does not command the conclusion that such state may levy such a tax upon the receipts from the sale of *intangible* property sold by a resident of another state. Were the state of destination to attempt such legislation, the taxpayer (seller) in the state of departure would lose no time invoking the rule mobilia sequuntur personam and the decisions thereupon.

Where intangible property is concerned we do not think it possible that the "risk" or "vice of multiple taxation", can be invoked even were a mere and unmaterialized risk of multiple taxation a sound reason for nullifying a tax imposed by the state of the seller. In *Int. Harv. v. D. of Treas.* this court held that where the record shows no tax on the same event the mere possibility of such will not invalidate the tax already levied.

We also suggest that a difference in the shipping arrangements of the J. D. Adams Mfg. Co. might bring its transactions within the reach of the Indiana Gross Income Tax. For, had that Company placed its machinery upon

a common carrier F.O.B. Indianapolis, Indiana, the sale would have been completed in Indiana and subject to the Indiana tax as well as a Use Tax in the state of destination.[26] In this case the placing of the securities in the U. S. mails was analogous.

In the McGoldrick-Berwind-White case, the Court said:

> "The ultimate burden of the tax both in form and substance is thus laid upon the buyer for consumption of tangible personal property * * *. It is conditioned upon events occurring within the State * * *."

In its meaning and application, therefore, it is unlike an excise tax levied by the state of the seller. We do not think that the reasoning of the Berwind-White decision would permit the state of the buyer to levy a tax upon the gross receipts from the sale of securities, because of the same facts pointed out heretofore, namely: that tangible property is capable of acquiring a situs for sale in a state other than that of the seller, while in the case of intangible property, such a circumstance is not present except in instances where "business situs" is concerned.

While we realize that "*mobilia sequuntur personam*" is a common-law maxim and has often been subjected to the accusation that it is a mere fiction, yet no longer ago than 1928, this Court said its application must be accepted as settled.[27] With the exception of the "business situs" cases, we know of no instance where it has ever been modified or limited. It must be accepted in the absence of any ruling

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26. *McLeod v. Dilworth*, (1944), 322 U. S. 327.

27. *Blodget v. Silberman* (1928), 277 U. S. 1, 9, and 10.

or statute to the contrary, unless "business situs" in another state is actually a fact.[28]

In this case, these securities were offered for sale. The offer to sell preceded the offer to buy, but, once offered and the purchaser's acceptance taken, the essence of the sale was complete, and the rule of the New York Stock Exchange became effective.[29] The "State of occurrence" is Indiana.

The "business situs" cases hold that intangibles can be taxed at a situs other than domicile of the owner. This is taken to mean that New York, or any other state, could have taxed these intangibles if they had acquired a "business situs" there. But they did not acquire such a situs. It is not contended that they did. Since they must have a situs somewhere, the conclusion must be that their only situs was the domicile of the owner until after the sale was completed and their situs then became the domicile of the new owner.

True, some of the mechanical features of the sale transpired in New York City at the Exchange, but that fact does not change the circumstance that the situs of the securities remained at Richmond, Indiana, until transportation to New York became necessary. Up until the time of the completion of the sale, these securities were under the jurisdiction of the sovereign state of Indiana and an intangible tax could be imposed upon them, and the state retained this right until the sale was completed to some new owner or his broker, located in some state.

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28. *Curry v. McCanless* (1939), 307 U. S. 357; *Wheelock-Lovejoy & Company v. Gill* (1937), 366 Ill. 378; 9 N. E. (2d) 58, 59.

29. Rule 116, N. Y. Stock Exchange. "All bids made and accepted, and all offers made and accepted, in accordance with Rules 100 to 136, inclusive, shall be binding."

The fact that there is in the United States a large Mart for the exchange of securities, drawing its business from all states, territories and, in fact, from every country in the world, should not operate to place any other state at a disadvantage in taxation, nor lend itself to the compounding of an immunity which would reach to every state in the Union.

The business of the New York Stock Exchange involves the sale of hundreds of thousands of securities every business day. Certainly some of these securities are sold by Indiana owners. It also certainly must be possible that some of the purchasers of the stock of Indiana owners are occasionally Indiana persons. But would the fact that the stock of an Indiana owner found its way to a *new* Indiana owner through the medium of the New York Stock Exchange, make it an interstate transaction? If so, how could such a transaction be distinguished from an "over-the-counter" sale through the medium of a local dealer in securities? Would the mere fact that a telegraph message which conveyed the offer to sell took a trip from Indiana to New York City, and a message conveying the offer of acceptance took a trip from New York City to Indiana, suffice in itself, to brand this an interstate commerce transaction and bar Indiana from taxing receipts therefrom? We think not. The principles of taxation must comprehend something more fundamental than physical acts. So must the principle of interstate commerce immunity. If not, then there is indeed an exaggeration of the importance of "mechanical and artificial distinctions" and an unwarranted intrusion upon the real and basic reasons for interstate commerce immunity.

No longer can interstate commerce be regarded as an inviolate sanctum which may not ever be invaded just because it is interstate commerce. Such a theory, if it ever

was actually considered by the Court, has been abandoned. Recent cases[30] held that the Constitutional inhibition against burdening interstate commerce means that the inhibited burden does not refer to a single tax imposed by one state, but rather to more than one tax imposed by different states, which combination would result in interstate commerce bearing a greater burden than that which intrastate commerce is forced to bear. Even as far back as 1919 this court enunciated, and has since reiterated, the theory that interstate commerce must pay its own way and bear its share of state tax burdens.[31]

It has not been shown that this tax unduly burdens the Appellant; that it discriminates against the commerce; that it interferes with or interrupts it; or that it regulates it in any manner whatsoever. These are the true constitutional tests of immunity. There must be one of those basic elements present in every case if a state is to be barred from imposing a tax which it has chosen to be a part of its system of taxation for raising the revenue necessary for its existence.

The only straw of multiple taxation at which the Appellant can grasp in this case, is that the New York Transfer Tax was paid, or might have been paid[32] as a consequence of this sale. But the New York Transfer Tax, in nature and effect, is far different from a tax upon the gross receipts of the seller.

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30. *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33; *International Harvester Co. v. Dept. of Treasury* (1944), 322 U. S. 340.

31. *Postal Telegraph & Cable Co. v. City of Richmond* (1919), 294 U. S. 252-59; *Gwin-White & Prince v. Henneford* (1939), 305 U. S. 434; *McGoldrick v. Berwind-White* (1940), 309 U. S. 33; *Western Live Stock v. Bureau of Rev.* (1938), 303 U. S. 250.

NOTE: Nothing in the record that shows payment.

Such tax does not even have any relation to gross receipts where the selling price is $20.00 or more. The transfer tax does not use the gross receipts of the seller as its measure, but only a limited maximum of the selling price of a share of stock. It is a tax solely upon an act—the act of transferring beneficial interest in the legal title to shares and certificates—and it becomes due immediately upon the doing of that taxable act. It is an excise tax upon the transfer.[33] In fact, it is not even necessary that a sale occur or receipts be obtained in order for the transfer tax to attach. It attaches even though the transfer was a gift, a bequest or inheritance.[34]

So far as it being a "substantial tax" is concerned, we present an example wherein 100 shares of stock are sold for $100.00 each—selling price therefor is $10,000.00. The Indiana Gross Income Tax on this transaction would be $100.00.[35] If such a sale were to escape the Indiana Gross Income Tax but be forced to pay the New York Transfer Tax, the total tax payable would be 4c times 100 shares, or only $4.00.[36] A tax so inconsequential by comparison, should

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33. Cooley Taxation, Vol. 4 (4th Ed.), page 3494, Sec. 1764.

"The section imposes the tax upon all agreements or instruments for the transfer of shares of corporate stock. It is in the nature of an excise tax on the transfer."

U. S. Radiator Co. v. State of N. Y. (1913), 208 N. Y. 144; 101 N. E. 783;

Arden Farms Co. v. State (1946), 60 N. Y. S. (2d) 47, 49.

34. Ruling of New York Tax Commission, Article 14 (CCH N. Y., Vol. 2, p. 6311).

35. Sec. 3(g) Indiana Gross Income Tax Act 1937 as amended; Burns' Indiana Statutes, § 64-2603.

36. New York Stock Transfer Law. Thompson Laws of New York, Sec. 270, Art. 12.

not be permitted to inveigh against multiple taxation inhibitions even had the record shown that it was paid.

In this case, the Indiana tax does not result in discriminatory taxation against interstate commerce, nor does it place such transactions in unequal and unfair positions with other transactions locally completed. Our analysis of this Court's interpretation of the Constitution of the United States and its relation to commerce between the states, is that such inhibitions encompass only the burdening of the commerce, regulation of it, interrupting it, discriminating against it and interfering with it. Just because a tax is imposed upon receipts from a transaction which may happen to have incidental interstate commerce attributes, it by no means follows that any of the elements of prohibition named have been trespassed against.

We recognize that the sales of securities may be a proper subject of interstate regulation because of the means which are used to complete the sales, namely, mail, telegraph, telephone and other means of communication and transportation. We think that is as it should be, but that fact has no bearing upon the legality of a tax imposed on *receipts from sales* of intangibles even though they may be proper subjects of interstate commerce *regulation*. Local transactions must pay this tax without question and without the hope of appeal to the haven of interstate commerce immunity, be that haven an abstract theory or a concrete thing. Certainly the Constitution never intended that interstate commerce transactions should go wholly free from tax and thus wholly escape their share of the local burdens of government. The Constitution is not one-sided. It would fail in its purpose if it permitted interstate commerce immunity to discriminate against commerce that is wholly local, as well as protecting interstate commerce from dis-

crimination. In the early and formative stage of the Union it may have been necessary that commerce between the states be subjected to rigid rules, but in the present times it would be inconsistent with national unity and detrimental to the states, for transactions to wholly escape tax for the sole reason that they are interstate. This would mean that in the plan of a union of states, the mere fact that incorporeal boundry lines separate one state from another, would operate to place *local* transactions at a competitive disadvantage. Naturally, distinctions of jurisdiction are necessary, but this fact should not engender situations where local transactions are forced to pay a tax but identical ones in interstate commerce pay either none at all, or one so infinitesimal that the inequality still remains.

We do not believe that the Appellant has presented in any of his brief sufficient reasons for reversing the decision of the Indiana Supreme Court in this case.

We further believe that of all the cases involving the Indiana Gross Income Tax and its relation to interstate commerce which this Honorable Court has heard and decided, this case presents the least basis of immunity.

Therefore, the decision of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 3

ALMIRA G. FREEMAN, as Successor Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

MOTION FOR LEAVE TO FILE AND BRIEF AND PETITION ON BEHALF OF THE STATES OF CALIFORNIA, CONNECTICUT, FLORIDA, KENTUCKY, MAINE, NEVADA, NEW MEXICO, NORTH DAKOTA, UTAH, WASHINGTON, AND WEST VIRGINIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ALMIRA G. FREEMAN, as Successor Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant;

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

No. 3

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Come now the undersigned, and move the Court that leave be granted to file a Brief as Amici Curiae in the

above entitled cause, pursuant to Rule 27 (9) of the Supreme Court of the United States.

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STATEMENT OF THE CASE

As stated in the majority opinion "This case presents another phase of the Indiana Gross Income Tax Act of 1933, which has been before this Court in a series of cases beginning with *Adams Mfg. Co. v. Storen*, 304 U. S. 307." It is also one in a series of cases involving state taxes measured by gross receipts as follows, in chronological order:

Fisher's Blend Station, Inc. v. Tax Commission et al. (1936), 297 U. S. 650, 56 Sup. Ct. 608, reversing and remanding 182 Wash. 163, 45 Pac. 2d 942, 49 Pac. 2d 1151;

Puget Sound Stevedoring Co. v. State Tax Commission (1937), 302 U. S. 90, 58 Sup. Ct. 72, modifying 189 Wash. 131, 63 Pac. 2d 532;

Western Live Stock et al. v. Bureau of Revenue et al. (1938), 303 U. S. 250, 58 Sup. Ct. 546, affirming 41 N. M. 288, 67 Pac. 2d 505.

J. D. Adams Manufacturing Co. v. Storen, et al. (1938), 304 U. S. 307, 58 Sup. Ct. 913, affirming in part and reversing in part 212 Ind. 343, 7 N. E. 2d 941;

James v. United Artists Corp. (1939), 305 U. S. 410, 59 Sup. Ct. 272, affirming 23 Fed. Supp. 353;

Gwin, White & Prince, Inc. v. Henneford, et al. (1939), 305 U. S. 434, 59 Sup. Ct. 325, reversing 193 Wash. 451, 75 Pac. 2d 1017;

Department of Treasury of Indiana, et al. v. Wood Preserving Corporation (1941), 313 U. S. 62, 61 Sup. Ct. 885, reversing 114 Fed. 2d 922;

Department of Treasury of Indiana, et al v. Ingram-Richardson Manufacturing Co., of Indiana, Inc. (1941), 313 U. S. 252, 61 Sup. Ct. 866, reversing 114 Fed. 2d 889;

International Harvester Co., et al v. Department of Treasury (1944), 322 U. S. 340, 64 Sup. Ct. 1019, affirming 221 Ind. 416, 47 N. E. 2d 150;

McLeod v. J. E. Dilworth Company et al (1944), 322 U. S. 327, 64 Sup. Ct. 1023, affirming 205 Ark. —, 171 S. W. 2d 62.

Each of the cited cases deals with the impact of the commerce clause, Article 1, Section 8, Constitution of the United States upon the taxing power of state and local government. The following decisions decided during the same period of time also treated directly with like considerations: *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 60 Sup. Ct. 388, reversing 281 N. Y. 610, 670, 22 N. E. 2d 173, 764; *McGoldrick v. Felt & Tarrant Mfg. Co.* (1940), 309 U. S. 70, 60 Sup. Ct. 404, reversing 279 N. Y. 678, 18 N. E. 2d 311; 280 N. Y. 688, 21 N. E. 2d 197; 281 N. Y. 608, 669; 22 N. E. 2d 177, 763.

The question before the Court in the instant case was whether the State of Indiana might, in imposing its tax upon the privilege of domicile or the privilege of transacting business within the State, include in the measure

thereof the proceeds from sales of securities to non-local purchasers through the media of independent sales agencies within and without the State of Indiana. The question raised by the majority opinion is whether this tax is a direct imposition upon an interstate sale and as such an interference by a state with the freedom of interstate commerce. The fundamental question which *amici curiae* seek to have determined is whether the limiting effect of the commerce clause upon state tax legislation is to be found applicable in every case in which interstate commerce exists or whether the criteria announced in the *Adams* case, *supra*, and in subsequent cases are to continue to furnish the guides for determining the limiting effect of the commerce clause upon the tax powers of the States.

ARGUMENT

I

The Indiana Supreme Court has concluded that the Indiana gross income tax is an "excise levied upon those domiciled within the state or who derive income from sources within the State, upon the basis of the privilege of domicile or the privilege of transacting business within the State and that the burden may reasonably be measured by the amount of income." *Miles v. Dept. of Treasury*, 409 Ind. 172, 182, appeal dismissed 298 U. S. 640.

The amount charged by particular states for exercising such a privilege is a cost of doing business in those states, but "* * * the bare fact that one is carrying on interstate commerce does not relieve him from any forms of state taxation which add to the cost of his business * * *". *Western Live Stock et al v. Bureau of Revenue et al.* (1938), 303 U. S. 250, 58 Sup. Ct. 546.

II

Freeman is the person here sought to be taxed. The tax, when paid, becomes a cost of doing business. The tax could not be duplicated, he could not incur a similar cost of doing business, in any other jurisdiction. The tax, as imposed, could not deter the flow of interstate commerce, because it is obvious that no different result would obtain in Freeman's liability had he refrained from making interstate sales. The tax, as applied, has no possibility of the dangerous consequences to interstate commerce

pointed out in the *Berwind-White* case, supra, and equality is its theme as it is presently administered by the Department of Treasury of the State of Indiana. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 48. Freeman received the same income whether he paid the tax or not. He paid the same tax whether local or interstate sales were involved. He did not do business in any other jurisdiction with respect to these sales, so that he was subject to no other taxing jurisdiction and an apportionment of his tax would be, from the facts of the cases, measured in an apportionment of 100% to the State of Indiana, and, though we do not consider it controlling, he could hardly, from the nature of the transactions in which he engaged, pass on the amount of the tax to his purchasers, since it is hard to see how sellers of securities on the New York Stock Exchange would receive anything but the going market price, less usual brokerage charges.

III

Such state taxation, when not sustained, has been struck down when it has been discriminatory and singled out interstate commerce (*Philadelphia and Southern S. S. Company v. Pennsylvania*, 122 U. S. 326); when it has not been fairly apportioned, (*Gwin, White & Prince, Inc., v. Henneford et al* (1939), 304 U. S. 307, 58 Sup. Ct. 913); when it has resulted in subjecting interstate commerce to the risk of a multiple tax burden, (*J. D. Adams Manufacturing Co. v. Storen et al* (1938), 304 U. S. 307, 58 Sup. Ct. 913).

The majority opinion says "of course this is an interstate sale". Granting, but not conceding, that such is the case, it does not from that fact follow that a local tax upon the privilege of doing business, affecting all who exercise the privilege within the jurisdiction in the same manner, which includes the proceeds of such a sale within the measure thereof is a direct imposition upon interstate commerce and consequently offensive to the Constitution of the United States.

The position of amici curiae is, and they respectfully request the court to hold, that privilege taxes levied upon local residents for the privilege of doing business are not direct levies upon interstate commerce; that they are direct levies upon local residents; that they may be improper when they include as a measure of liability proceeds from certain interstate sales; that improper inclusion of the proceeds of an interstate sale in the measure of a gross income privilege tax makes such taxes invalid but does not necessarily constitute them direct taxes upon interstate commerce. This position, taken in response to the majority pronouncement indicates the unsatisfactory nature of the "legal incidence" approach to the validity of state tax statutes under the commerce clause. As the court has indicated in its decisions, it is the commerce itself which is to be protected against burden and impediment and mere choice of words in legislation cannot deprive the commerce clause of its effectiveness. A purely formalistic approach brings no satisfactory answer.

IV

By the commerce clause Congress is given the power to regulate commerce among the several states. Congress has not attempted to make any regulation with respect to the effect upon that commerce of gross income taxes levied by the several states. The majority opinion points out however that even without such implementing legislation, the commerce clause is a limitation upon the power of the states. But such limitation as is imposed by the commerce clause exists only from the implications thereof. Taxes by states involving interstate commerce are not to be sustained when they single out interstate commerce for hostile action or have the effect of impeding the free flow of trade between states. Conversely, unless such taxes may be said to have such effect, they do not violate the commerce clause.

To find that a sale in interstate commerce has been made and has somehow been considered in determining the amount of local tax imposed on local individuals is not ipse dicta to find that such a tax is within the area created by the force of the commerce clause itself as being free from interference by the states. Further, it must appear in addition to the fact that commerce is being done, that the tax has imposed burdens upon, or impedes that commerce so as to amount to a regulation thereof. "Not every local law that affects commerce is a regulation of it in a constitutional sense" *(Western Live Stock et al v. Bureau of Revenue et al, supra.)*. Those taxes that have been found to violate the commerce clause must be said to have

been found by the court to be a regulation of commerce in the constitutional sense.

V

Because of the ramifications of modern business and the gradually expanding fields of national interconnection, increasing numbers of transactions and modes of doing business assume interstate aspects. It has appeared to those entrusted by the laws of the various states with the duty of administering their respective tax laws that the decisions of the court must serve as a guide in determining the limits and the proper manner and application of state taxing authority. This is right and proper, for the language of the commerce clause alone does not serve such purpose.

VI

From the cases cited in p. 1 of this brief, a semblance of order has appeared and from them the principles enunciated by the court have seemed to direct that a tax imposed directly upon interstate commerce would be unconstitutional, while tax imposed on a local activity would be sustained, even though incidentally affecting interstate commerce, if it did not subject the commerce incidentally affected to the risk of multiple taxation; if it did not discriminate against interstate commerce; if it did not deny an apportionment in cases where the levy were capable of reproduction in other state taxing forums.

In the dissenting opinion of Mr. Justice Rutlege in the case of *McLeod v. J. E. Dilworth Company* a resume to this effect appears:

> "The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corrollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 55-56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton v. Missouri*, 91 U. S. at 275; *Guy v. Baltimore*, 100 U. S. 434; *Voight v. Wright*, 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434; *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special."

VII

For the court to state, as did the majority in this case, that no good purpose would be served by reviewing the

past cases and that each case in this field "must be read in the opinion of the particular cases and as the production of preoccupation with their special facts" is to cut tax administrators adrift in a sea of hopeless confusion. The decisions of the court constitute the only guide for continuity of administrative policy in the interpretation of the commerce clause as it affects state taxation. It should be the function of the court to attempt, as it has in the past, to harmonize, if possible, what has been said in the past so as to clarify and serve as a guide for the future. If the court does not perform this function, if there is no reasonable predictability in the law applying to this field, the very basis for the rule of stare decisis is itself threatened. If, indeed, each case is to rest upon its own special facts with no attempt to place it within a framework of judicial interpretation, the result cannot be otherwise than to encourage a multiplicity of litigation in the interstate commerce taxation field. If the court proposes to strike down taxes which affect interstate commerce without dealing in considerations of fairness or unfairness, that rule should be announced. If considerations of fairness or unfairness are to be weighed where interstate commerce is incidentally affected, the court should set the standards of weight. We take the position that the *Adams, Gwin, White & Prince, Berwind-White, Fisher's Blend, Dilworth* and other related cases set standards and we petition the court to apply such standards to the instant case to fit it into this framework of decisions.

The court will recognize that not all tax administrators are trained in the law nor are they all lawyers. These administrators turned to various sources as guides and also

to various tax services. Certainly the court should be concerned with this aspect of its decisions as are amici. We respectfully quote a report appearing in the Lawyers Weekly Letter, a publication printed by Prentice-Hall, Vol. 2, No. 13 issue of December 23rd, 1946:

> "Supreme Court Decisions: Freeman v. Hewitt (No. 3): This is probably the most revolutionary —and certainly the least understandable—decision of the Court on state taxation of interstate commerce in many years. To quote the separate concurring opinion of Justice Rutledge: 'This is a case in which the grounding of the decision is more important than the decision itself.' • • •"
>
> "• • • It is impossible to overestimate the importance of the decision or to predict its results. Taken literally, the majority opinion can be read to mean that no state taxes on interstate commerce are permissible except a use tax imposed on the consumption of goods within the state of consignment. • • •"

VIII

Following the reasoning of the majority opinion, we agree with the starting premise that the commerce clause of its own force creates an area free from state interference. Nor can there be any question that a state is precluded from taking any action which fairly may be deemed to have the effect of impeding the free flow of interstate commerce. We cannot disagree with the statement that the mere fact that local commerce and interstate commerce bear the same burden locally is insufficient ground upon which to base a contention of validity in the face of the

commerce clause. We agree with the majority opinion that a remote or unsubstantial interference with a national interest (interstate commerce) may in some cases be insufficient to result in the overriding of local legislation.

The next point made in the decision is that state taxation falling on interstate commerce can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. Whether this is a holding of the court or an argumentative statement, it is one with which amici cannot agree, for state taxation, no matter where it falls, is justified by the exercise of state constitutional powers. Striking down of state tax legislation on the basis of the delegation of power made to the Congress of the United States in Article 1, Section 8 of the Constitution of the United States can be justified only if it is absolutely necessary by such means to protect interstate commerce against discrimination and undue burdens, and to allow the free flow of trade between the several states. The court's scrutiny of state taxes is well justified. That scrutiny should always involve the consideration of whether in affording to interstate commerce the necessary insulation, more is not taken from the states than was actually delegated to the Congress by them.

IX

Proceeding further, the court states that the *fact* of a tax on interstate commerce puts impediments upon the currents of Congress across the state line and the court points out that the commerce clause was designed to prevent states from exacting toll from those engaged in na-

tional commerce. It might be said that the commerce clause was designed to enable Congress to set standards of fairness by which commerce among the states might be regulated, but, accepting the court's statement, it does not necessarily follow that any tax on interstate commerce will place impediments upon it. This language would seem to be directly contra to that used by Mr. Justice Stone in the *Gwin, White & Prince, Inc., v. Henneford et al.*, case, *supra*, where more than the mere fact of such tax was said to be necessary. The tax was found to be bad because, though measured by the entire volume of the interstate commerce, it was not apportioned to the local activity of the taxpayer within the taxing state. The statement of facts contained in the record of the case showed that appellant had representatives at numerous points outside the State of Washington who acted on its behalf. Clearly some part of the total proceeds from the commerce engaged in were allocable to these extrastate activities. To that extent *Gwin, White & Prince* might have been subjected to tax with respect thereto by jurisdictions outside the State of Washington. If the test of apportionment is to be applied here, however, and the decision implies that this tax is comparable to a direct unapportioned tax on gross receipts, it is inconceivable that any less than 100% of Freeman's activities could be allocated to the State of Indiana. He had no representatives outside of the State. It is true that he dealt with persons in other states, but he had no place of business anywhere but in the State of Indiana. It and no other jurisdiction could possibly have subjected him to a tax measured by his gross receipts. This, the court will bear in mind, is a different state of facts than

that which existed in either the *Adams* case or the case of *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740 (1943) affirming 220 Indiana 340, 42 N. E. 2d 34 (1942).

In each of those cases Indiana sought to tax a domestic corporation, with principal place of business in Indiana. Each corporation had places of business outside of said State. In the *Adams* case, the vice of the statute was that it measured the tax by including activities of interstate commerce without apportionment, and that such commerce might thus be subjected to a ruinous double burden. It was decided first and the Indiana Supreme Court rightly found, when confronted with the *Allied Mills* case, that there was no possibility of multiple taxation in the State to which the goods were shipped because, on the authority of the *Adams* case, the shipping State could not impose such tax. This case was affirmed per curiam as above cited. The considerations which the Indiana Court had to balance after the *Adams* case, which it did so balance to the satisfaction of this Court, are not present in the instant case, because the taxpayer had no place of business outside of the State of Indiana, was not in fact, "doing business" outside the State of Indiana and any effect on interstate commerce, if such there was, was purely incidental, remote and unsubstantial.

On page 8 of the majority opinion herein, in speaking of the invalidity of a direct unapportioned tax on gross receipts as being beyond the State taxing power, the Court cited, among other cases, *Puget Sound Stevedoring Co. v. State Tax Commission* (1937), 302 U. S. 90, 58 Sup. Ct. 72. This case, by reason of the cases of *Joseph McGoldrick et al.*

v. John T. Clark & Son, and *Joseph D. McGoldrick et al. v. Carter & Weekes Stevedoring Co.,* heard by the Court in reargument on the twelfth day of November, 1946, is being questioned and we respectfully request the Court to apply to its previous decision in the *Puget Sound Stevedoring Co.,* and in the *Fisher's Blend* case, *supra,* the reasoning of the later cases herein cited, which set forth reasonable rules for preservation of State taxing power, while saving to interstate commerce the full protection to which it is entitled under the commerce clause.

CONCLUSION

We respectfully petition the Court to review its opinion herein. We respectfully petition that the Court apply to the facts of the record the criteria announced in the decisions to which we have referred.

We respectfully petition the Court to clarify its opinion and to furnish a guide for future State administrative and legislative action. And we further petition the Court to withhold any final decision in the instant matter until announcement of the pending decision in the companion cases *Joseph D. McGoldrick, et al v. Carter & Weekes Stevedoring Co., and Joseph D. McGoldrick, et al v. John T. Clark & Son,* Nos. 29 and 30, October term 1946.

We finally urge the Court that a rehearing be granted because the interests of the States represented by petitioners herein is so vital, and we request that petitioners

be permitted to present their views by oral argument before the Court.

Respectfully submitted,

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State of West Virginia.

I join with petitioners insofar as they have asked for a clarification of the scope of the majority decision.

GROVER A. GILES,
Attorney General,
State of Utah.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 4

ALVIN T. [illegible], as Executor, Trustee and [illegible] of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT H. [illegible], Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

Appeal From the Supreme Court of Indiana

APPELLEE'S MOTION FOR AFFIRMANCE AND BRIEF THEREON

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

ALMIRA G. FREEMAN, as Successor Trustee Under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

No. 3

APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLEE'S PETITION FOR REHEARING AND BRIEF THEREON

The appellee in the above entitled cause, respectfully petitions the Court to grant a rehearing in said cause for the reason that the Court erred in its opinion, decision and judgment in the following particulars, to-wit:

1. By inferentially disregarding the long established doctrine on Interstate Commerce as declared in previous

decisions of this Court upon which the various taxing laws of the several states are founded and enunciating the rule that transactions in interstate commerce are wholly immune from state taxation solely because of its being commerce of that nature and regardless of the discriminatory nature of the tax, its economic effect upon interstate commerce, or the other considerations by which this Court has sustained state taxes upon interstate commerce in the past.

2. By misconstruing the Gross Income Tax Law of Indiana as applied to this transaction in view of the legislative and judicial history of that law following the decision in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, in this, that such legislative history clearly indicates that the Indiana Gross Income Tax is in reality two distinct taxes, and that the tax upon residents of the State of Indiana is an excise levied upon the local privilege of residence within the State, although measured by gross receipts, and is no longer in any sense a tax upon the transactions from which the receipts are derived.

3. In holding that this tax is a tax on the "sale" (instead of upon the receipts from sale) and that it is therefore a direct tax on commerce.

4. By discarding the rule of *mobilia sequuntur personam* in regard to this particular tax while retaining such rule as to taxes of other natures and while retaining and applying the fiction of *que facit alia facit per se.*

5. By disregarding the economic facts and practical problems of government applicable to the situation at hand and attempting to interpret the Constitution of the

United States by *a priori* reasoning, and without reference to previous cases thereby throwing the revenues of the several states into utter confusion.

6. By overlooking the provisions of the Securities and Trust Indenture Act (U.S.C.A. Title 15, No. 77 zzz, and the Securities Exchange Act), (U.S.C.A. Title 15, No. 77 bb) and the intent of Congress there expressed to occupy only a portion of the field of Securities regulation and leave the remainder of this field to the states.

WHEREFORE and for other reasons appearing in petitioner's briefs, petitioner respectfully urges that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

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Deputies Attorney General,

Attorneys for Appellee.

STATE OF INDIANA }
MARION COUNTY } ss:

I, JOHN J. McSHANE, Deputy Attorney General, of Indianapolis, Marion County, Indiana, and attorney of record in the above cause and an attorney regularly admitted to practice in the United States Supreme Court, do certify that in my opinion the foregoing petition for rehearing in the case of Almira G. Freeman, as successor Trustee Under the Will and of the Estate of Henry C. Starr, deceased, appellant, vs. Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, appellee, cause numbered 3 on the dockets of this Court, is well founded and is not presented for the purpose of creating any delay. That the petition and briefs thereon are presented in all good faith and honesty.

JOHN J. McSHANE,
Deputy Attorney General.

STATE OF INDIANA }
MARION COUNTY } ss:

Subscribed and sworn to before me a Notary Public in and for said county and state this 3d day of January, 1947.

HANNAH M. McELWAINE,
Notary Public.

My Commission Expires Feby. 9, 1948.

(S E A L)

OUTLINE OF ARGUMENT

I

1. The nub of the Court's opinion is that the invalidity of the tax here involved rests on the fact that it interfers with interstate commerce without any thing more.

2. The Court thus rejects discrimination against interstate commerce as a test.

3. Likewise, the Court holds the previous test of multiplicity of taxation to be immaterial.

4. The Court equally rejects the validity of an apportioned tax.

5. Also rejected is the principle that interstate commerce must pay its way.

6. The previous decisions of this Court cannot stand against this doctrine so enunciated and the revenues of the states will be reduced to utter confusion if this doctrine prevails.

II

1. The Indiana Gross Income Tax Law levies two separate taxes:

> (a) A tax against residents of the state measured by their gross income from sources both within and without the state, with certain exceptions, but payable solely by reason of their residence.

(b) A tax against non-residents measured by their receipts from activities within the state and payable by virtue of such activities.

2. Obviously, the tax against residents is an excise upon their privilege of domicile and not upon the transactions from which the gross income is derived, as many of these transactions are not in themselves and apart from such domicile, within the taxing jurisdiction of Indiana.

3. The cases in this and the Indiana courts fully establish this distinction between the tax on residents and non-residents.

4. Therefore, assuming the premise of the court that a direct tax on interstate commerce is invalid, yet, since the Indiana tax is levied upon the local event of residence and is merely measured by gross receipts, the Court should have affirmed the decision below.

III

1. Assuming that the Court adheres to the position urged as erroneous in one (1) *supra*, yet the Indiana Gross Income Tax in the present case is valid when under the formalistic approach to which the Court would revert.

2. The Indiana Gross Income Tax is a tax imposed upon a taxable local privilege, i. e., domicile and measured by gross receipts.

3. Even under the earliest decisions of this Court in regard to gross receipts taxes this tax would not be held to be a direct tax upon interstate commerce.

4. The Indiana Gross Income Tax is not a tax upon the transactions of its residents giving rise to the income, but on the contrary attaches to gross receipts of the taxpayer independently of their source and by reason of the privilege of local residence.

5. In view of the above it is impossible to see how the tax can be a "levy upon the very process of commerce", since the processes of commerce have already completely transpired before the tax can be levied and the tax is levied upon the gross receipts for the privilege of domicile.

6. Therefore the Court erred in holding it to be a tax upon the sale.

IV

1. In holding that Indiana's power to tax the gross income or gross receipts from these transactions is not affected by the fact that the domicile of the seller or the situs of the securities prior to conclusion of the sales was in Indiana, and in holding that the domicile and situs do not have a material effect upon the application of the Gross Income Tax Act.

2. This disregard of the rule of *mobilia sequuntur personam* for this one purpose only, is wholly inconsistent with this Court's previous decisions in all other fields of taxation; in its decisions in regard to business situs; and in its decisions in many other branches of the law.

V

1. The resultant affects of this decision as to a practical administration.

2. The loss of revenue to the state and other states as a result of this opinion.

3. Some observations in regard to the sale and transfer of stocks, bonds and other securities on the New York Stock Exchange.

4. A consideration of the National Marketing idea in relation to the sale of stocks and bonds.

VI

1. The Court's apparent failure, in its opinion, to consider the application of the Securities Act and the Act governing Securities Exchanges.

2. Conclusion.

ARGUMENT

I

It would be presumptuous for the appellee to repeat the suggestions outlined in the concurring opinion of the Court of the primary premise of the majority opinion in this cause, which is, or at least appears to be, that interstate commerce transactions are completely free from state taxation by any state regardless of whether such state tax discriminates against interstate commerce; regardless as to whether there is any actual or potential danger of a multiplicity of taxation by different states, and regardless of whether there is an apportionment of the tax. If this statement of the Court be taken at its face value, then all references by the Court in the decisions from *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, to date, in regard to multiplicity of taxation, discrimination against interstate commerce, and apportionment of taxation between states, must be wholly disregarded as immaterial and irrelevant.

All statements by this Court in the last ten years to the effect that interstate commerce must pay its own way become empty syllogisms. The many state taxes which are founded upon the principle of equality of treatment between intrastate and interstate commerce must be drastically revised in order to impose a heavier burden upon intrastate commerce so that sufficient revenue will be obtained for the discharge of the state's functions.

It may be that the Court did not intend to state so drastic a revision of constitutional doctrine as the appellee here

represents to be the opinion of the Court. However, to those who cannot search the minds of the Court, this would appear to be the most reasonable interpretation to be placed upon the opinion. Meanwhile, this lack of clarity in the opinion, will undoubtedly result in the loss of millions of dollars of state revenue and the expenditure of hundreds of thousands of dollars in litigation expense before the correct interpretation of the Court's opinion can be established.

The Appellee respectfully urges the Court to delay its mandate, the effect of which, will jeopardize the revenues and financial stability of the States until upon re-hearing it may be fully and further advised of the wide latitude and effect of the present opinion and the inherent errors therein.

II

The Court in its majority opinion relied for an interpretation of the Indiana Gross Income Tax Law, on the case of *Adams Mfg. Co. v. Storen, supra* (1938), 304 U. S. 307, where the Court characterized the tax upon the examination of the original Indiana Gross Income Tax Law, adopted in 1933, without the benefit of definite judicial interpretations and applications of that law and without reference to the amendment of that law in 1937.

The appellee would further call the Court's attention to the fact that the Gross Income Tax Law provides for two separate and distinct taxes levied upon different bases. By Sec. 2 of the act, the tax is specifically levied upon the entire gross income of all residents of the State of Indiana,

but as to non-residents it is levied upon the gross income derived from activities or businesses or any other source within the state. An example of the radical difference between these two taxes is obtained by the comparison of the class of the decisions of the Indiana Supreme Court in the cases of *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, (decision based on 1937 Act); and the *Department of Treasury v. Allied Mills, Inc.* (1942), 220 Ind. 340, (decision based on 1933 Act). In the former case, the Class "A" sales of the taxpayer which constitute all sales solicited in Indiana by a non-resident taxpayer but shipped into the state from an out-of-state branch, were held not to be within the purview of the Indiana statute. In the latter case, it was affirmed by this Court the gross receipts from the identical type of sale made by an out-of-state branch of a resident corporation of Indiana, were held taxable, the only distinction between the cases being that in one instance the corporation was a domestic corporation and in the other instance a foreign corporation.

The tax was not, therefore, levied upon the sales for the sales were in each instance identical. The domestic corporation paid the tax solely by reason of the fact that it enjoyed the privilege of domicile in Indiana, and the right to make receipt of Gross Income in Indiana. Other illustrations of the same point could be multiplied, and examples furnished. We would call the attention of the Court to but a few. An Indiana resident is taxed upon wages and salaries earned and received in a foreign state not because Indiana has authority to tax the act of earning a salary, or the payment of salary in another state, but because In-

diana has authority to tax its residents upon their privilege of domicile. Likewise, Indiana levies its tax upon a taxpayer consummating a local business transaction in another state not because it may tax a business transaction occurring in the other state, but because of its ability to tax its residents by virtue of their domicile, and right to receive gross income.

Therefore, if a direct tax upon interstate commerce is invalid, it necessarily follows that a tax upon a local event would be valid, then insistence is made that the Indiana tax was valid for it is in no sense a direct tax upon interstate commerce. It is a tax upon a resident of Indiana for the exercise of his local privilege of domicile, which, in that sense is similar to the tax in *American Mfg. Co. v. St. Louis,* 250 U. S. 459 (1919), which is measured by the gross receipts of the taxpayer.

The case at bar is a shining example of the local privileges which are thus taxed. The appellant derives his existence and all of his powers as a Trustee by virtue of the laws of the State of Indiana. That, then, is *quid pro quo,* for which the appellant pays his tax. Certainly, the creature of the state is not a "frankenstein" who, upon his creation, passes beyond the power of the state to control and regulate. The state may here forbid its Trustee from trafficking in corporate securities, whether intrastate or interstate commerce. It may so classify the securities in which the Trustee may invest as to exclude stocks and bonds issued by foreign corporations. All of the actions of the Trustee are subject to the orders and approval of the Court under whose jurisdiction this Trustee serves. Yet this

Court holds that the state may not exercise the lesser power of permitting such investment under the lesser regulation created by its tax. Such power to forbid traffic in corporate securities to its Trustees entirely would not rest upon any power of the state to regulate the interstate traffic in securities, but would rest rather upon its control over a local Trustee by reason of the local domicile of the trust. The power to tax rests upon the same basis and resting upon that basis is not and does not purport to be a regulation of interstate commerce as such.

Therefore, assuming the premise of the Court that a direct tax on interstate commerce is invalid, then the Indiana tax levied upon the local event of residence by the appellant within the state and measured by the gross receipts, should have been affirmed in the decision below.

III.

From the earliest decisions of this Court it has been held that where a tax is levied upon a privilege of local domicile, the tax may be measured by the taxpayer's income, computed on either gross or net basis, even though such income be derived in part from interstate commerce, thus in *State Tax on Railway Gross Receipts* (1873), 15 Wall. 284, a state tax levied upon the privilege of local domicile, was held valid, for the reason, among others, that the privilege of local domicile would support it even though included in measure of the tax were the gross receipts from both intrastate and interstate transportation. See *Lockhart, Gross Tax Receipts on Interstate Transportation and Communication,* 42 Harvard Law Review, pp. 44 to 47.

The rationale of this early decision is sound for the reason that the right to receive income, whether gross or net, is one of the privileges of local domicile as is the right to manufacture within the state is a local privilege as held in *American Manufacturing Co. v. St. Louis* (1919), 250 U. S. 459.

Insofar, therefore, as the tax is levied against residents of Indiana, it is levied upon the entire local domiciliary privilege of receiving income. In this respect a distinction between gross income and net income would be a matter of degree only. What deductions from gross income would be essential to convert the tax from a gross income tax to a net income tax? Would a state be required to permit the deduction of every item of expense to accomplish this conversion? The appellee is forced to the conclusion that the Court, in asserting this tax to be an imposition upon the very processes of commerce between the states, misunderstood the scope and application of the tax and relied entirely upon the statement in the *Adams* case in regard to the gross income tax law before its amendment and prior to extensive judicial history or practical application had been made. The Court also apparently adopted an erroneous conception of the nature of the application of the Indiana Gross Income Tax law in that the Court apparently catalogued it as a tax upon the *sale*, or *act of selling* the securities in this case. However, this tax is unlike a sales tax or a tax upon the act of sale, wherein the tax would apply when the sale was made whether payment was received then or never.

The gross income tax as to residents of Indiana attaches to receipts from sales only *if, when and after receipts are* received by the seller.

The tax is imposed, not for the privilege of making the sale, but for the domiciliary privilege of receiving money from the sale. The liability for tax arises *when payment is received* and when interstate processes and out-of-state processes *have been completed and come to an end.* It cannot be actually said then that this tax is either levied upon, or conditioned upon, or is a direct burden upon the sale or other transaction giving rise to the income, or that the necessity arises for an apportionment.

It may perhaps be said that the tax indirectly affects and possibly indirectly burdens interstate or out-of-state commerce, but such indirect burden arises solely because this tax upon the local domiciliary privilege of receiving gross income attaches to the result of interstate commerce but not to its process.

This tax is not discriminatory. It is levied uniformly and indiscriminately upon all receipts. It does not single out interstate commerce receipts or any other receipts for imposition. It attempts only to provide that interstate commerce shall bear a fair share of the cost of the local government whose protection it enjoys and the same share of the cost of government borne by intrastate commerce.

Therefore, this case falls within the *Railway Gross Receipts* case, *supra,* as a tax upon a taxable privilege (domiciliary privilege of receiving income) even though the measure of the tax be the receipts themselves and such re-

ceipts had their origin in interstate commerce. This case has not been overruled as to this point although it has been distinguished and if the Court intends to return to the doctrines of 1873, it should at least make application of those doctrines in a consistent and logical manner so as not to extend restrictions beyond those enunciated by this Court at an early date.

IV

In holding that the domicile of the seller and that the situs of these intangibles prior to sale in no way had a material effect upon the application of this tax and in rejecting the maxim of "*mobilia sequuntur personam*", the Court will compel a complete reapplication of not only the tax laws of the state, and the entire nation, but also many other laws.

The rule of "*mobilia sequuntur personam*" has been observed for so long and it has become so deeply rooted in the law of the land that it has become basic. The rule has been recognized heretofore by the Court and has not to our knowledge been changed until now. It has been accepted as a contra situs to business situs in the Court's "business situs" decisions. This Court has apparently discarded the rule in regard to this particular tax while retaining such rule as to taxes of other types and while retaining the fiction of "*que facit per alia facit per se.*"

We respectfully suggest that while the Court calls it a "fiction" in this case, yet in *Curry v. McCanless* (1939), 307 U. S. 357, 366, the Court stated that "it cannot be dissociated from the persons from whose relationship they

are derived. These are not in any sense fictions. They are indispensable realities".

It is inconceivable that the Court can deem the "*mobilia sequuntur personam*" doctrine to be a mere fiction which it may lightly toss aside in a particular case to accomplish a particular result without causing serious repercussions in other cases of entirely different nature. For example, this case is a case involving a particular type of transfer of securities in which interstate transportation of the securities occurred as an incident to the transfer. Transfer by inheritance is another type of transfer of securities wherein interstate transportation of the certificates to the issuing corporation or its stock registrar commonly occurs as a means of affecting and evidencing the transfer. If a transfer by sale is interdicted by reason of the interstate transportation of the certificates, would not a transfer by inheritance accomplished through a like transportation be equally interdicted? It needs no great flight of the imagination to conjure various and sundry other propositions of like nature in regard to their taxes on other types of property and even entirely different legal situations where this Court will be asked again, again and again to toss aside not only this particular so-called fiction, but others as well which are equally well established in the law. A sale of real property located within the State may be consummated by means of interstate commerce and the actual sale may occur by means of interstate transmission of the documents of title as occurred in this case. Will this Court there disregard the local situs of real property for property and inheritance tax purposes in order to hold the gross receipts from such a sale to be exempt? What end can

there be to the course upon which this Court has embarked? What is our destination and what preparation can the states make for this uncharted voyage into the unknown? Certainly the states as sovereign members of this federation and as partners to the Constitution of the United States, should have some guide by which they can chart their financial course. This Court after solemnly proclaiming that the *mobilia* doctrine is not a fiction but is an indisputable reality, should not so lightly toss it aside.

V

If the appellee is incorrect in the interpretation of this Court's opinion in drawing the conclusion therefrom that the Court is returning to the empty formalism expressed in its earliest decisions, such error is a result of the language of the opinion and the appellee can feel only that it is not, by any means, alone in giving such interpretation to the Court's opinion. The volume of personal calls, telegraph messages and correspondence received by the Indiana Gross Income Tax Division since this opinion was handed down is abundant evidence of a general conception throughout the country that the Court in its opinion swept away the rationale of the decisions of the last ten years in the field of state taxation. It is clearly indicated that a volume of litigation can be expected from this opinion and the construction generally placed upon it will be phenomenal. The opinion by its lack of clarity and its adoption of a new rationale for the determination of state tax cases, invites a myriad of actions to determine tax liability in a multitude of situations where it had been confidently assumed by both the taxing authorities and the taxpayers

that such litigation was foreclosed by previous decisions of this Court in which the doctrines governing taxability were well established.

The appellee does not desire to be unduly critical of the language of the Court nor to cavil at minor inconsistencies or obscurities, but the fact remains that the tax laws of the State of Indiana and other forty-seven states comprising this nation, cannot be successfully administered when the hint of a major change in doctrine is obscure and the basis for such change of doctrine is not stated by the Court. The appellee would respectfully urge upon the Court that in the last ten years this Court has done much in behalf of its tax cases in its other opinions upon the Commerce Clause to bring about an adjustment between the jurisdiction of the federal and state governments upon the basis of a particular regard for the equity, sovereignty and the necessities of each. The Court, in this period, has put the breath of actual experience into the Commerce Clause and thus brought it to life. In its opinion in this case, however, the Court has disregarded this particular adjustment between the correlative powers of the state and the federal government. Let us look at these transactions as they are ordinarily and commonly regarded in the law and in the actual experience of the parties.

When the appellant offered the securities for sale, upon acceptance, assignment and deposit in the mails, the sale, so far as he was concerned, was complete and both parties were bound. *Rule 116 New York Stock Exchange, Corporation Law No. 10.* IN RE: *McCafferty's Will*, 264 N. Y. S. 38, 14 C. J. 1033, 1050, 7 R. C. L. 239, 243, 245.

The deposit of the securities in the mails by the Trustee constituted delivery.

Howbert v. Penrose, 38 F. (2) 577, 579, 68 A. L. R. 820.

Stock certificates are merely evidence of the ownership of shares or the aliquot part of the holders interest in the stock. They are not the stock itself. Certificates of stock and shares of stock are different legal entities.

14 C. J. 506, 509;
Bombal v. People State Bank of Ramsey, 10 N.E. (2) 651, 653, 367 Ill 113.

Shares of stock and certificates for shares of stock are different legal entities. 14 C. J. 506, 509.

A certificate of stock is merely the symbol or paper evidence of the ownership of shares or of the aliquot part of the holders ownership in the stock. They are not the stock itself,

Bombal v. Peoples State Bank of Ramsey, 10 N.E. (2) 651, 367 Ill. 113.

and while the stock certificates were transmitted to the purchaser, after purchase, the shares of stock or the debt evidenced by the banks remained undisturbed, except as to the passing of the title. The securities that were transmitted through the mails therefore were not those of the Trustee, but belonged to the purchaser, thus constituting a specie of delivery.

These statements, supported by the authorities, correspond with the actual conception of the party. When the appellant dealt with his local broker, he dealt with an independent marketing organization, or agency, located in the State of Indiana. He cared not to whom or by what means the transaction was closed so long as he obtained a price determined by reference to sales made in the City of New York. For certain legal purposes and by reason of the historical origin and development of the stock market, the local broker, and even the New York broker, whom the appellant may never have met and whose identity might have been wholly unknown to the appellant, are considered as agents of the appellant.

There is no showing made nor reference given as to the identity or residence of the purchasers in the opinion as would be pertinent in the application of the rule handed down in the *Allied Mills* case.

The Court gave no importance to the domicile of the purchaser merely assuming that because the transaction was handled on the New York Stock Exchange, it was a process of interstate commerce.

By disregarding the pragmatic approach of the Court in its opinions of the last ten years, the Court has disrupted the functions of the states and has concentrated the only possible taxing power in those few states which have securities exchanges. At least, the Court has left standing without comment, the only case concerning the right of a state to tax the sale of securities.

O'Kane v. State (1940) 28 N.E. (2d) 905.

It is certainly not a pragmatic approach to permit a few states having the focus of a national market located within their borders to levy tribute upon the receipts of every state dealing with that national security and into which that market extends, all in derogation of the right of the other states to tax their local residents upon the domiciliary privilege of receiving gross income. If the market be truly a national interstate market, it extends as well, into the State of Indiana and is as much there located as in any other state.

It is vital that the appellee be given the opportunity of re-presenting this case to the Court with a view of a reversal of its majority opinion.

VI

The acts of Congress relating to securities and securities exchanges have been overlooked in this case and the history of such exchanges in relation to the Commerce Clause has not been mentioned. Congressional power over the market for the sale of cattle was first denied by this Court on the ground that such market did not constitute interstate commerce. Thereafter, the Congressional Act regulating such a market was sustained on the doctrine, not that it was interstate commerce but that it affected interstate commerce. This decision may be extended by anology to the stock exchange.

Pursuant to the power so established, the Congress enacted the Securities Act, which is titled 15 U.S.C.A. Sec. 77 zzz, providing:

> "* * * nor shall anything in this subchapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person or security, insofar as such jurisdiction does not conflict with any provisions of this subchapter or any rule, regulation, or order thereunder."

Congress also, in its regulation of Securities Exchanges (U.S.C.A. Title 15, Sec. 78 bb) provided:

> "* * * Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

These paragraphs clearly evidence an intent by Congress not to assume exclusive jurisdiction over the regulation of interstate commerce in securities, but rather to leave with the states full power to regulate such interstate commerce and securities to the full extent that Congress did not act.

Since state taxation is only invalid when it amounts to a *regulation*[1] of interstate commerce and since Congress has expressly disclaimed exclusive jurisdiction over that commerce, it must be interpreted that Congress has acceded to the state regulations under either the policy or taxing power except as such regulation contravenes congressional provisions. Let it be known that Congress

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[1] Constitution of U. S. Art. 1, Sec. 8 (3).

did not grant certain specific rights of regulation to the States, but rather left it with the states.

Therefore, it is submitted that the tax in this case might well be sustained upon the basis of Congressional consent and Congressional action in like manner as the tax was sustained in *Prudential Ins. Co. v. Benjamin* (1946), — U. S. —. (Supreme Court Reporter advance sheet, Vol. 66, No. 17—7-1-46.)

For the above and foregoing reasons, the appellee prays that its petition for a rehearing in this case be granted.

Respectfully submitted,

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Frankfurter } p. 2.
Rutledge } pp. 1, 2, 9, 11, 12, 20, 23, 24, 25,

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1946.

Almira G. Freeman, as successor, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Appellant, v. Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.	Appeal from the Supreme Court of the State of Indiana.

[December 16, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case presents another phase of the Indiana Gross Income Tax Act of 1933, which has been before this Court in a series of cases beginning with *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. The Act imposes a tax upon "the receipt of the entire gross income" of residents and domiciliaries of Indiana but excepts from its scope "such gross income as is derived from business conducted in commerce between this state and other states of the United States . . . to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States." Indiana Laws 1933, p. 388, 392, as amended, Laws 1937, p. 615, Burns' Ind. Stat. Anno. § 64–2601 *et seq.*

Appellant's predecessor, domiciled in Indiana, was trustee of an estate created by the will of a decedent domiciled in Indiana at the time of his death. During 1940, the trustee instructed his Indiana broker to arrange for the sale at stated prices of securities forming part of the trust estate. Through the broker's New York correspondents the securi-

ties were offered for sale on the New York Stock Exchange. When a purchaser was found, the New York brokers notified the Indiana broker who in turn informed the trustee, and the latter brought the securities to his broker for mailing to New York. Upon their delivery to the purchasers, the New York brokers received the purchase price, which, after deducting expenses and commission, they transmitted to the Indiana broker. The latter delivered the proceeds less his commission to the trustee. On the gross receipts of these sales, amounting to $65,214.20, Indiana, under the Act of 1933, imposed a tax of 1%. Having paid the tax under protest, the trustee brought this suit for its recovery. The Supreme Court of Indiana, reversing a court of first instance, sustained the tax on the ground that the *situs* of the securities was in Indiana. 221 Ind. 675, 51 N. E. (2d) 6. The case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. 344 (a), and has had the consideration which two arguments afford.

The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States.[1]

[1] Compare Report of the [Australian] Royal Commission on the Constitution (1929) pp. 260, 322–24, and Report of the [Canadian] Royal Commission on Dominion-Provincial Relations (1940), bk. II, pp. 62–67, 111–21, 150–62, 216–19. See Australia, Act No. 1, 1946, repealing Act No. 20, 1942, and Act No. 43, 1942; *South Australia v. Commonwealth*, 65 C. L. R. 373; also Proposals of the Government of Canada, Dominion-Provincial Conference on Reconstruction pp. 47–49; Proceedings of the Dominion-Provincial Conference (1945) *passim*, particularly the statement of Prime Minister Mackenzie King, p. 388, and the discussion following. And see Maxwell, The Fiscal Impact of Federalism in the United States (1946) cc II, XIII, XIV.

The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.

Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. —. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather

than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *The Minnesota Rate Cases*, 230 U. S. 352, 402 *et seq.*; *S. C. Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209–12. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the national government and

the States in regard to revenues from interstate commerce. See Act of July 3, 1944, 58 Stat. 723; H. Doc. 141, 79th Cong., 1st Sess., "Multiple Taxation of Air Commerce"; and compare 54 Stat. 1059, 4 U. S. C. § 13 *et seq.* (permission to States to extend taxing power to Federal areas). Considerations of proximity and degree are here, as so often in the law, decisive.

It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things.

This case, like *Adams Mfg. Co.* v. *Storen*, *supra*, involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe

from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165. It can impose license taxes on domestic and foreign corporations who would do business in the State, *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 364, though it cannot, even under the guise of such taxes, "hamper" interstate commerce. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56 (particularly White, J. concurring at p. 63); Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 118–23, 128–31. It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *cf. Atlantic Coast Line* v. *Daughton*, 262 U. S. 413. And where, as in this case, the commodities subsequently sold interstate are securities, they can be reached by a property tax by the State of domicil of the owner. *Virginia* v. *Imperial Sales Co.*, 293 U. S. 15, 19; and see *Citizens National Bank* v. *Durr*, 257 U. S. 99.

These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the

costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause.

It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least

deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax.

It has been urged that the force of the decision in the *Adams* case has been sapped by *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. The decision in *McGoldrick* v. *Berwind-White* was found not to impinge upon "the rationale of the *Adams Manufacturing Co.* case," and the tax was sustained because it was "conditioned upon a local activity, delivery of goods within the State upon their purchase for consumption." *309 U. S. at 58. Compare McLeod* v. *Dilworth Co.*, 322 U. S. 327. Taxes which have the same effect as consumption taxes are properly differentiated from a direct imposition on interstate commerce, such as was before the Court in the *Adams* case and is now before us. The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. See also, *e. g.*, *Galveston, Harrisburg Ry. Co.* v. *Texas*, 210 U. S. 217; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 231; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 94; and compare *Wallace* v. *Hines*, 253 U. S. 66. For not even an "internal regulation" by a State will be allowed if it directly affects interstate commerce. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 494.

Nor is *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, or *Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, any justification for the present tax. The *American Mfg. Co.* case involved an imposition by St. Louis of a license

fee upon the conduct of manufacturing within that city. It has long been settled that a State can levy such an occupation tax graduated according to the volume of manufacture. In that case, to lighten the manufacturer's burden, the imposition of the occupation tax was made contingent upon the actual sale of the goods locally manufactured. Sales in St. Louis of goods made elsewhere were not taken into account in measuring the license fee. That tax, then, unlike this, was not in fact a tax on gross receipts. Cf. *Cornell* v. *Coyne*, 192 U. S. 418. And, if words are to correspond to things, the tax now here is not "a tax on the transfer of property" within the State, which was the basis for sustaining the tax in *Harvester Co.* v. *Dept of Treasury, supra*, at 348.

There remains only the claim that an interstate sale of intangibles differs from an interstate sale of tangibles in respects material to the issue in this case. It was by this distinction that the Supreme Court of Indiana sought to escape the authority of *Adams Mfg. Co.* v. *Storen, supra*. Latin tags like *mobilia sequuntur personam* often do service for legal analysis, but they ought not to confound constitutional issues. What Mr. Justice Holmes said about that phrase is relevant here. "It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important." *Blackstone* v. *Miller*, 188 U. S. 189, 204. Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth $65,214.20, rather than machines.

Reversed.

MR. JUSTICE BLACK dissents.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1946.

Almira G. Freeman, as successor, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Appellant, v. Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.	Appeal from the Supreme Court of the State of Indiana.

[December 16, 1946.]

Mr. Justice Rutledge, concurring.

This is a case in which the grounding of the decision is more important than the decision itself. Whether the Court now intends simply to qualify or to repudiate entirely, except in result, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, I am unable to determine from its opinion. But that one or the other consequence is intended seems obvious from its refusal to rest the present decision squarely on that case, together with the wholly different foundation on which it now relies. In either event, the matter is of large importance and calls for discussion.

I

The *Adams* case held the Indiana tax now in issue to be invalid when applied, *without apportionment*, to gross receipts derived from interstate sales of goods made by Indiana manufacturers who sold and shipped them to purchasers in other states. "The vice of the statute" as thus applied, it was held, was "that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid *to the fullest extent* by States in which the goods are sold as well as those in which they are manufactured. Inter-

state commerce would thus be subjected to *the risk of a double tax burden* to which intrastate commerce is not exposed, and which the commerce clause forbids." (Emphasis added.) 304 U. S. 307, 311.[1]

Today's opinion refuses to rest squarely on the *Adams* case, although that case would be completely controlling if no change in the law were intended. No basis for distinguishing the cases on the facts or the ultimate questions is found or stated. The Court takes them as identical.[2] Yet ~~the Court~~ places no emphasis upon apportionment, the absence of which the *Adams* opinion ~~regarded as~~ crucial. The Court also puts to one side as irrelevant the factor there most stressed, namely, the danger of multiple taxation, that is, of similar taxation by other states, if the Indiana tax should be upheld in the attempted application.

Those matters were the very essence of the *Adams* decision. They were in its words "the vice" of the statute as applied. The *Adams* opinion gives no reason for believing that the application of the tax would not have been sustained if either of the two elements vitiating it had been absent. On the contrary, the fair, indeed the necessary, inference from the language and reasons given is that the

[1] The Court added: "We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. 307, 311–312. Cf. notes 5 and 16.

[2] The only factual difference is that here the sales were of securities, there of goods. It was this upon which Indiana has relied to distinguish the *Adams* case, asserting originally that it gave domiciliary foundation for sustaining the tax. This claim disappeared, in effect, at the second oral argument, and the Court does not rest on it. I agree that, for present purposes, sales of intangibles should be treated identically with sales of goods.

tax would not have been voided if there had been no danger of multiple state taxation or if the tax had been apportioned so as to eliminaate that risk. Moreover those groundings were strictly in accord with long lines of previous decisions rendered here,[3] were intended to conform to them and to preserve them unimpaired.

Yet now they are put to one side; either as irrelevant or as not controlling and therefore presumably as insufficient,[4] in favor of another rationalization which ignores them completely. Shortly, this is, in reiterated forms, that the tax as applied is laid "directly on" interstate commerce, is a levy "on the very sale" or "the very process" of such commerce, is therefore and solely thereby a "burden" on it, and consequently is an exaction the commerce clause forbids. What outlaws it is neither comparative disadvantage with local trade nor any actual or probable clogging or impeding effect in fact.[5] It is simply the "direct" bearing and "incidence" of the tax on interstate commerce and this alone. Stripped of any discriminatory element and of any actual or probable tendency to block or impede the commerce in fact, this "direct incidence" is itself enough without more to invalidate the tax, although it is one of general application singling out the commerce neither for separate nor for distinct or invidious treatment.

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[3] See, *e. g. Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335. And see especially discussion in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255–257.

[4] Compare the opinion of MR. JUSTICE FRANKFURTER in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292.

[5] As the Court says, "An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." The only "interference" held to be important is the direct incidence of the tax on the commerce, not the double burden or risk of it. Cf. notes 1 and 16.

If this ever was the law, it has not been such for many years. In a sense it is a reversion to ideas once prevalent, but long since repudiated [6] about the "exclusiveness" of Congress' power over interstate commerce which, if now resurrected for general application, will strike down state taxes in a great variety of forms sustained consistently of late. Not since *Cooley* v. *Board of Wardens*, 12 How. 299, has the notion prevailed that the mere existence of power in Congress to regulate commerce excludes the states from exacting revenue from it through exercise of their powers of taxation.[7] Yet if a general tax, applying to all commerce alike, is to be outlawed, regardless of discriminatory consequences or actual or probable impeding effect in fact, simply because it bears "directly" on the commerce and for no other reason, not only will there be a resurrection of Marshall's "exclusive" idea, never prevailing after the *Cooley* case. The effect will be to knock down many types of state taxes held valid since that landmark decision.[8]

That consequence must follow if the presently asserted basis for decision is to be taken as a principle fit for general application and intended to be so used. We cannot assume that the Court intends it to be used otherwise, for that would be to make of it an arbitrary formula applied to dispose of the present case alone and having no validity for any other situation. But the ground relied upon is broad enough to include many other types of situation

[6] See *e. g.* Ribble, State and National Power Over Commerce (1937) 204; Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 3–10. See also Frankfurter, The Commerce Clause (1937) 53: "Had Marshall's theory of the 'dormant' commerce power prevailed, the taxable resources of the states would have been greatly confined. The full implications of his theory, if logically pursued, might well have profoundly altered the relations between the state and the central government."

[7] See note 6. See also Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785, quoted in note 10 infra.

[8] Cf. text infra at notes 14 to 16, also 21, and authorities cited.

and of tax, and cannot be restricted logically or in reason to these narrow facts. If discrimination and real risk—in the sense of practical effect to clog or impede trade, are irrelevant to the validity of this type of tax; they are equally irrelevant to many others, unless sheer fiction and arbitrary distinction based on inconsequential factors are to be controlling. If the grounding which disregards them is adequate for disposing of this case, it is adequate also for disposing of many others involving it in which the Court has been at great pains to rest on other factors, unnecessarily it now would seem.

It will be appropriate, before turning to further consideration of the more pertinent decisions, to note the only basis upon which the Court grounds its ruling that "direct" state taxes on "the very process" of interstate commerce are void. This is because, in the words of the opinion, the commerce clause "by its own force created an area of trade free from interference by the States." Although this is stated as grounding for the long established conclusion that even without implementing legislation by Congress the clause is a limitation upon state power, it also is quite obviously the foundation of the further conclusion that "direct" taxes laid by the states within that area are outlawed regardless of any other factor than their direct incidence upon it.

II

I agree that the commerce clause "of its own force" places restrictions upon state power to tax, as well as to regulate, interstate commerce. This has been held through various lines of decision extending back to *Gibbons v. Ogden*, 9 Wheat. 1, some of them unbroken.[9] I

[9] See *e. g.*, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325; *Nippert* v. *Richmond*, 327 U. S. 416, and authorities cited.

also agree that this construction is consonant with the great purpose of the commerce clause to maintain our distinctively national trade free from state restrictions and barriers against it which the clause was adopted to prevent. But, at any rate since *Cooley* v. *Board of Wardens, supra*, this has not meant that the clause was intended to or could secure "by its own force" that vast area of commercial activity wholly free from "interference," that is, from taxation and regulation, by the states.[10] Nor for many years has it meant that the field of interstate commerce is to be free from such "interference," simply because it is "direct" or has immediate incidence upon it.[11] True, language frequently appears in the cases, especially the earlier ones, to the effect that "direct" taxation and regulation by the states are forbidden. But apart from its inconsistency with both language and results in other cases,[12] in most of those where it has appeared there were other invalidat-

[10] See Ribble, *supra*, at 72 ff.; FRANKFURTER, *supra*, at 24, 56; Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785: "It will summarize his basic conception to say that as the issues were framed in the long debate the position taken by the Court in *Cooley* v. *Board of Wardens* comes closest to according with his thought."

[11] "Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought." *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 259. See also the dissenting opinion of Mr. Justice Stone in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (overruled by *California* v. *Thompson*, 313 U. S. 109), "In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

[12] See, *e. g.*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Nippert* v. *Richmond*, 327 U. S. 416.

ing factors, such as singling out the commerce for special treatment, other types of discrimination, or failure to apportion where multiple state taxation could result if the tax were sustained.[13]

[13] Gross receipts taxes which have been sustained fall into the following groups: (a) Those which were fairly apportioned. See, *e. g.*, *Illinois Cent. R.* v. *Minnesota*, 309 U. S. 157; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Ficklen* v. *Taxing District*, 145 U. S. 1. (b) Those which have been justified on a "local incidence" theory. See, *e. g.*, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, with which compare *Fisher's Blend Station* v. *Tax Com'n.*, 297 U. S. 650; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459. See also cases cited in note 21. In many cases apportioned gross receipts taxes have been sustained not on the ground that they were apportioned but that they were local in nature. See, *e. g.*, *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431; *Wisconsin & Michigan Ry.* v. *Powers*, *supra*; *U. S. Express Co.* v. *Minnesota*, *supra*.

Gross receipts taxes which have not been sustained fall into the following groups: (a) Those which were not fairly apportioned. See, *e. g.*, *Oklahoma* v. *Wells Fargo Co.*, 223 U. S. 298. (b) Those which were not apportioned and subjected interstate commerce to the risk of multiple taxation. *Philadelphia & So. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439. Cf. *Fargo* v. *Michigan*, 121 U. S. 250, as explained in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 256. (c) Those in which there was a discriminatory element in that they were directed exclusively "at transportation or communication," Lockhart, Gross Receipts Taxes on Transportation (1943) 57 Harv. L. Rev. 40, 65–66. *Galveston, H. & S. A. Ry.* v. *Texas*, 210 U. S. 217, and cf. *New Jersey Tel. Co.* v *Tax Board*, 280 U S. 338. But see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362. In both the *Galveston* and *New Jersey Telephone Company* cases, although the taxable events all occurred within the taxing state, the possibility of multiple taxation was nevertheless present. (d) Those in which there was no discrimination but a possible multiple burden. *Fisher's Blend Station* v. *Tax Board*, *supra*, as explained in *Western Live Stock* v.

The fact is that "direct incidence" of a state tax or regulation, apart from the presence of such a factor, has long since been discarded as being in itself sufficient to outlaw state legislation. "Local" regulations, under the *Cooley* formula, bear directly on the commerce itself.[14] But they are not outlawed for that reason. Calling them "incidental," where this is done, does not make them "indirect," except in judicial perspective. Police regulations bear no more indirectly or remotely upon the interstate commerce which must observe them than upon the local commerce falling equally within their incidence.

Again, an apportioned tax on interstate commerce is a "direct" tax bearing immediately upon it in incidence. But such a tax is not for that reason invalid. Decisions have sustained such taxes repeatedly, regardless of their direct bearing, provided the apportionment were fairly made and no other vitiating element were present, such as those above mentioned.[15] It was this fact, without question, which the Court had in mind in the *Adams* case, when it carefully saved from its ban any question concerning such a tax as Indiana's if properly apportioned in a situation like the ones presented there and now.[16]

Bureau of Revenue, 303 U. S. at 260–261. (e) Those in which there was no discrimination, no apportionment and no possibility of multiple burden. *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90. This decision, it may be noted, might have been rested upon the clause of the Constitution forbidding the states to tax exports. Cf. *Richfield Oil Corp.* v. *California*, No. 46, decided November 25, 1946.

[14] Cf. *California* v. *Thompson*, 313 U. S. 109; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Robertson* v. *California*, 328 U. S. —. Indeed, sometimes police regulations bear more heavily on interstate commerce. Cf. *Robertson* v. *California*, *supra*, and cases cited at note 28 therein.

[15] See cases cited in note 13, *supra*.

[16] The Court said, in answer to the Indiana Supreme Court's emphasis upon the "generality and nondiscriminatory character" of the levy, "but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. at 312; cf. note 1, *supra*.

III

The language purporting to outlaw "direct" taxes because they are direct has appeared more frequently perhaps in relation to gross receipts taxes than any other, including both "direct" taxes, apportioned and unapportioned, and others considered "indirect" because purporting to be laid not "on the commerce itself" but upon some "local incident." We have recently held that a tax having effects forbidden by the commerce clause will not be saved merely because it is cast in terms of bearing upon some "local incident." [17] As we then said, all interstate commerce takes place within the states and the consequences forbidden by the commerce clause cannot be achieved legally simply by the device of hooking the tax or other forbidden regulation to some selected "local incident."

The same statement is now made in this case not only to support the conclusion that these features cannot save a tax where the risk of multiple state taxation would outlaw it, as in the *Adams* case, but to support the vastly broader grounding that the tax is invalid simply because it is "direct" in its incidence. The quoted *Adams* statement had no such significance, as appears not only from its immediate context but also from the further statement, made apropos *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, in an effort to distinguish it: "It is because the tax, forbidden as to interstate commerce, reaches *indiscriminately and without apportionment*, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate." (Emphasis added.) 304 U. S. at 314. Not "direct" taxation simply, but taxing the entire proceeds without apportionment in the face of threatened or possible multiple state taxation was the "direct burden" found and outlawed in the *Adams* case.

[17] "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce." *Nippert* v. *Richmond*, 327 U. S. 416, 423.

That such a factor may be chosen for bearing the "direct" incidence of the tax may be a consideration to be taken into account in determining its validity. But it cannot validate a tax or regulation which produces the forbidden consequences, any more than a "direct tax" which does not produce them can be outlawed because it is direct. Not "directness" or "immediacy" of incidence *per se*, whether "upon the commerce itself" or upon a "local incident," is the outlawing factor, but whether the tax, regardless of the special point of incidence, has the consequences for interstate trade intended to be outlawed by the commerce clause.

The difficulty of any other rule or approach is disclosed most clearly perhaps by contrasting the decision in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, with the *Adams* decision and this one, in both of which efforts are made, unsuccessfully in my opinion, to distinguish the *American* case. There the tax was laid upon the manufacture, locally done, of goods sold locally and out of state. But the tax was "measured by" the gross receipts from sales of the goods manufactured, including those sold interstate.[18]

[18] To say that this was not in substance a tax on gross receipts, because sales in St. Louis *of goods made elsewhere* were not taken into account in measuring the tax, is simply to ignore the fact that the tax did include all interstate sales of goods manufactured and all returns from them. That the local sales of goods brought in from other states were excepted does not mean either that those sales were interstate transactions (which it was not necessary to decide in view of their exemption) or that the sales out of state included in the measure were not interstate transactions; or that they were not, in substantial effect, taxed upon their gross returns by the measure, notwithstanding the tax was made legally to fall upon the privilege of manufacturing.

The *Adams* decision purported to distinguish *American Mfg. Co.* v. *St. Louis* simply on the ground that the tax was not one laid on the taxpayer's sales or the income derived from them, but was a license fee for engaging in the manufacture which could be measured "by the sales price of the goods produced rather than by their value at the date of manufacture."

A tax upon a local privilege *measured by* the volume of gross receipts from both local and interstate trade [19] would seem to have, in practical effect, the same consequences for blocking or impeding the commerce as one laid "directly" upon it certainly in any situation where no multiple levy is made, likewise in any where more than one state might find such a local privilege for pegging the tax.[20] And a tax upon gross receipts "in lieu of" property or other taxes [21] cannot be said either to be less "direct" in its incidence upon the commerce than the application of the Indiana tax now in issue or to afford protection against multiple levies the risk of which was held in *Adams Mfg. Co.* v. *Storen* to make the Indiana tax inherently vicious in that application.[22]

Unless we are to return to the formalism of another day, neither the "directness" of the incidence of a tax "upon the commerce itself" nor the fact that its incidence is manipulated to rest upon some "local incident" of the interstate transaction can be used as a criterion or, many times, as a consideration of first importance in determining the validity of a state tax bearing upon or affecting interstate commerce. Not the words "direct" and "indirect" or "local incident" can fulfill the function of judgment in deciding

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[19] In addition to *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; see *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165.

[20] Cf. *Galveston, C. & St. L. Ry* v. *Texas*, 210 U. S. 217, 227; Morrison, State Taxation of Interstate Commerce (1942) 36 Ill. L. Rev. 727, 738.

[21] See *Postal Telegraph-Cable Co.* v. *Adams*, 155 U. S. 688; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Pullman Co.* v. *Richardson*, 261 U. S. 330. See also discussion in *Galveston, C. & St. L. Ry.* v. *Texas*, 210 U S. 217, 226–227.

[22] This is true, though concededly such a tax might work to prevent cumulative or higher tax burdens imposed by a single taxing state. Cf. Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication (1943) 57 Harv. L. Rev. 40.

whether the tax brings the forbidden results. See the dissenting opinion of Mr. Justice Stone in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44, quoted in note 11. That can be done only by taking account of the specific effects of state legislation the clause was intended to outlaw, and of the consequences actual or probable of the legislation called in question to create them.

IV

Judgments of this character and magnitude cannot be made by labels or formulae. They require much more than pointing to a word. It is for this reason that increasingly with the years emphasis has been placed upon practical consequences and effects, either actual or threatened, of questioned legislation to block or impede interstate commerce or place it at practical disadvantage with the local trade.[22] Formulae and adjectives have been retained at times in intermixture with the effective practical considerations. But proportionately the stress upon them has been greatly reduced, until the present decision; and the trend of recent decisions to sustain state taxes formerly regarded as invalid has been due in large part to this fact.

The commerce clause was not designed or intended to outlaw all state taxes bearing "directly" on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all state taxes, nor indeed all *direct* state taxes, can be said to produce those effects. On the other hand, many "indirect" forms of state taxation, that is, "indirect" as related to "incidence," do in fact produce such consequences and for that reason are invalid.

[22] See *Nippert* v. *Richmond*, 327 U. S. 416; *Best & Co.* v. *Maxwell*, 311 U. S. 454. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. —. See also Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785–787.

It is for this reason that selection of a "local incident" for hanging the tax will not save it, if also the exaction does not in fact avoid the outlawed interferences with the free flow of commerce. Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements.[24] The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state.[25] These matters are often interrelated, cf. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, though in other situations they may be entirely separate. The important difference is between situations where it is essential to show minimal factual connections of the transaction with the taxing state in order to sustain the levy as against due process objections for "want of jurisdiction to tax"; [26] and other situations where, although such connections clearly are present, the necessity is for showing that the tax, if sustained, will create a multiple tax load or other consequences having the forbidden effects.

This case is not one of the former sort. The transactions were as closely connected in fact with Indiana as with any other state.[27] But the case is one of the latter

[24] See dissenting opinion in *McLeod* v. *Dilworth*, 322 U. S. 327 at 356–357. See also *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445.

[25] See McNamara, Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales (1941) 8 Law & Contemp. Prob. 482, 491. Compare the discussion of a proposed federal statute to give the buyer's state the right to impose nondiscriminatory sales taxes. Proc. 27th Ann. Conf. Nat. Tax Assn. (1934) 136–160. See also Perkins, The Sales Tax and Transactions in Interstate Commerce (1934) 12 N. C. L. Rev. 99.

[26] Cf. note 25.

[27] Indiana was the state by whose law the trust was created. It was the *situs* of the trust's administration. It was the place where the securities were kept prior to mailing for delivery in accordance with

type, that is where, despite those connections, there were equally close and important ones in another state, New York; and therefore, as the *Adams* case declared, the risk of multiple state taxation would be incurred, unless one or the other or both states were forbidden to tax the transaction as such, or were required to apportion the tax. Not the "directness" of the tax in its bearing upon the commerce, but this danger is the crucial issue in this case, as it was in the *Adams* case. In other words, but for the possibility that more states than one would levy the same or a similar tax, such an application as was made of Indiana's tax in the *Adams* case and here would be no more burdensome or objectionable than other applications of the same tax this Court has sustained or of other taxes likewise held valid.[28]

V

This Court has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both the state of origin and the state of the market in recent years.[29]

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the terms of their sale. Cf. *Curry* v. *McCanless*, 307 U. S. 357. The directions for sale were given there. The proceeds were forwarded to Indiana and there received into the corpus of the trust. The state's connections with the trust, and with the property which was the subject of the sale, more than satisfy any due process requirement for exercise of the power to tax either the property or transactions relating to its disposition taking place as largely within Indiana's borders as did the sales in this case.

[28] The cases, aside from *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, which involve the Indiana gross receipts tax are: *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252; *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340; *Ford Motor Co.* v. *Dept. of Treasury*, 323 U. S. 459. See also *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335; cf. *Northwestern Airlines* v. *Minnesota*, 322 U. S. 292.

[29] See, *e. g.*, *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *General Trading Co.* v. *Tax*

Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin,[30] although this may be matter for debate. In any event, the factual connections of the taxing state with the interstate transaction in the cases where the tax has been sustained hardly can be regarded as greater or more important than those of Indiana with the transactions involved in the *Adams* case and here. Nor could it be shown in fact that in some of them, at any rate, the danger of multiple state taxation was appreciably less, if it be assumed that the forwarding state has the same power to tax the transaction, by pegging the tax upon a local incident, as has been recognized for the state of market.

Such taxes, whether in one state or the other, may in fact block or impede interstate commerce as much as, or more than, one placed directly upon the commerce itself. They have been sustained, nevertheless, not simply because of their bearing upon a local incident, but because in the circumstances of their application they were considered to have neither discriminatory effects upon interstate trade as compared with local commerce nor to impose upon it the blocking or impeding effects which the commerce clause was taken to forbid.[31]

This in my judgment is the appropriate criterion to be applied, rather than any mere question of "direct" or "indirect" incidence upon a "local incident." The absence of any such connection with the taxing state is highly

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Commission, 322 U. S. 335; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Coverdale* v. *Arkansas-Louisiana Pile Line Co.*, 303 U. S. 604; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252.

[30] Compare *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, with *McLeod* v. *Dilworth*, 322 U. S. 327. See Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909.

[31] See *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 58, quoted *infra* Part VI.

material.[32] Its presence cannot be the controlling consideration for validating the tax. *Nippert* v. *Richmond*, 327 U. S. 416. In this view it would seem clear that the validity of such a tax as Indiana's, applied to situations like those presented in the *Adams* case and now, should be determined by reference not merely to the "direct incidence" of the tax, but by whether those forbidden consequences would be produced, either through the actual incidence of multiple taxes laid by different states or by the threat of them, with resulting uncertainties producing the same impeding consequences.[33]

Thus, it is highly doubtful that the levy in this case, or in the *Adams* case, actually had any impeding effect whatever upon the transactions or the free flow interstate of such commerce.[34] But the *Adams* case found the impediment in the assumption that if one state could tax, so also could the other, and in that event, a double burden would result for interstate commerce not borne by local trade. This danger, it was said, was inherent in the type of the tax, since it was not apportioned, and in consequence the tax as applied must fall.

The basic assumption was not true as a universally or even a generally resulting consequence, for two reasons.

[32] As a matter of minimal due process requirements. Cf. text *infra* at notes 24 to 27.

[33] The danger of an impending burden or barrier from multiple state taxation could be real and substantial in a particular case if the threat of such taxation were actual or probable or if its threatened incidence were involved in such actual uncertainty that this uncertainty itself would constitute, in practical effect, a substantial clog.

[34] The Indiana tax was only one per cent of the proceeds of the sales. The record indicates, too, that the New York Stock Transfer tax was collected from the proceeds of the sale in New York. The amount of the tax was three cents per share sold for less than twenty dollars, and four cents per share sold for more than twenty dollars. Tax Law §§ 270, 270a; *O'Kane* v. *New York*, 283 N. Y. 439. The tax did not apply to the transfer of bonds. Cf. Op. Atty. Gen. N. Y. 1939, p. 208.

One is that it would not follow necessarily as a matter of fact that both states would tax or, if they did so, that the combined effects of the taxes would be either to clog or to impede the commerce.[35] The other, it no more follows, as a matter of law, that because one state may tax the other may do likewise.

The *Adams* decision did not take account of any difference, as regards the risk of multiple state taxation, between situations where the multiple burden would actually or probably be incurred in fact and others in which no such risk would be involved. It rather disregarded such differences, so that "the risk of double tax burden" on which the Court relied to invalidate the levy was not one actually, probably, or even doubtfully imposed in fact by another state.[36] It rather was one which resulted only from an assumed, and an unexercised, power in that state to impose a similar tax.

The Court was not concerned with whether the forbidden consequences had been incurred in the particular situation or might not be incurred in others covered by its ruling. The motivating fear was more general. The ultimate risk which the Court sought to avoid was the danger that gross income or gross receipts tax legislation, without apportionment, might be widely adopted if the door were once opened and, if adopted and applied to interstate sales by all or many of the states, would result generally in bringing such sales within the incidence of

[35] Cf. note 31. Whether such a tax would in fact produce the forbidden results or not would depend upon the incidence or likelihood of the incidence of a like tax in the other, or another, jurisdiction having similar power. Frequently this likelihood will be, in fact, either nil or small.

[36] The opinion discloses no consideration of any question or suggestion whether a like or other tax had been or was likely to be imposed by the state of destination, or even that such a tax by that state was doubtfully incident. Such an inquiry would have been inconsistent with the Court's thesis.

multiple state taxation of that nature. Rather than incur this risk, with the anticipated consequent widespread creation of multiple levies, the Court in effect forestalled them at the source. Its action was prophylactic and the prophylaxis was made absolute.

By thus relieving interstate commerce from liability to pay taxes in either state, without any showing that both had laid them, the effect was, not simply to relieve that commerce from multiple burden, but to give it exemption from taxes all other trade must bear.[37] Local trade was thus placed at disadvantage with interstate trade, by the amount of the tax, and the commerce clause thereby became a refuge for tax exemption, not simply a means of protection against unequal or undue taxation. Certainly its object was not to create for interstate trade such a specially privileged position.

But the alternatives to such a ruling were not themselves free from difficulty. They may be stated shortly. But preliminarily, I accept the view frequently declared [38] that a state runs afoul the commerce clause when it singles out interstate commerce for special taxation not applied to other trade or otherwise discriminates against it or treats it invidiously. Moreover, all other things being equal, multiple state taxation of gross receipts, although by nondiscriminatory taxes of general applicability, does compel the latter to bear a heavier tax burden than local trade in either state. The cumulative tax burden is in effect discriminatory, involving in any practical view the exact effects of a single discriminatory tax. Although the difference in total tax load may not be sufficient actually to

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[37] It is assumed, of course, that a nondiscriminatory tax of general applicability laid by the taxing state would be involved.

[38] See *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Hale* v. *Bimco Trading Co.*, 306 U. S. 375; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344; *Welton* v. *Missouri*, 91 U. S. 275; *Voight* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78.

block or impede the free flow of interstate trade,[39] discrimination alone, without regard to showing of further consequences, has been held consistently to be sufficient for outlawing the tax.

This too I accept. For discrimination not only is ordinarily itself invidious treatment, but has an obvious tendency toward blocking or impeding the commerce, if not always the actual effect of doing so. Nor is the discriminatory tendency or effect lessened because it results from cumulation of tax burdens rather than from a single tax producing the same consequence. To allow both states to tax "to the fullest extent" would produce the invidious sort of barrier or impediment the commerce clause was designed to stop. But the bare power of another state to tax unexercised does not produce such results. It only opens the way for them to be produced. This danger is not fanciful but real, more especially in a time when new sources of revenue constantly are being sought. Accordingly, I agree that this door should not be opened.

But it is not necessary to go as far as the *Adams* case went, or as the decision now rendered goes, in order to prevent the anticipated deluge. There is no need to give interstate commerce a haven of refuge from taxation, albeit of gross receipts or from "direct" incidence, in order to safeguard it from evils against which the commerce clause is designedly protective. Less broad and absolute alternatives are available and are adequate for the purpose of protection without creating the evils of total exemption.

The alternative methods available for avoiding the multiple state tax burden may now be stated. They are: (1) To apply the *Adams* ruling, stopping such taxes at

[39] For a variety of reasons, among which might be the larger capacity of such trade to absorb the difference, by reason of greater volume, without sustaining loss of profit, in the particular sort of commerce or type of transaction. See also note 34.

the source, unless the tax is apportioned, thus eliminating the cumulative burdens;[40] (2) To rule that either the state of origin or the state of market, but not both, can levy the exaction; (3) To determine factually in each case whether application of the tax can be made by one state without incurring actual danger of its being made in another or the risk of real uncertainty whether it will in fact be so made.

The *Adams* solution is not unobjectionable, for reasons already set forth. To deprive either state, whether of origin or of market, of the power to lay the tax, permitting the other to do so has the vice of allowing one state to tax but denying this power to the other when neither may be as much affected by the deprivation as would be the one allowed to tax and, in any event, both may have equal or substantial due process connections with the transaction. The solution by factual determination in particular cases of the actual or probable incidence of both taxes is open to two objections. One is that to some extent it would make the taxing power of one or both states depend upon whether the other had exercised, or probably would exercise, the same power. The other would lie in the volume of litigation such a rule would incite and the difficulties, in some cases at least, of making the factual determination.

VI

The problem of multiple state taxation, absent other factors making for prohibition, is therefore one of choosing among evils. There is no ideal solution. To leave the

[40] The *Adams* decision, of course, made no direct ruling upon an actual tax laid by the state of destination. But the basic premise of its rationalization would be altogether without substance if it were taken to mean that such a tax could be levied there without meeting the same barrier, and for the same reason, as the tax levied by Indiana, the state of origin, encountered.

matter to Congress, allowing both states to tax "to the fullest extent" until it intervenes, would run counter to the long-established rules not only requiring apportionment where incidence of multiple taxes would be likely, but also in substance and effect to those forbidding discrimination, without the consent of Congress, cf. *Prudential Life Ins. Co.* v. *Benjamin*, 328 U. S. —, as well as the long settled rule that the clause is "of its own force" a prohibition upon the states. To require factual determination of forbidden effects in each case would be to invite costly litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions, and encourage the enactment of legislation involving those consequences. The *Adams* ruling, as I have said, creates for many situations a tax refuge for interstate commerce and does this in both states.

As among the various possibilities, I think the solution most nearly in accord with the commerce clause, at once most consistent with its purpose and least objectionable for producing either evils it had no design to bring or practical difficulties in administration, would be to vest the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination. This too is more nearly consonant with what the more recent decisions have allowed, if full account is taken of their effects.

In *McLeod* v. *Dilworth*, 322 U. S. 327, 361, I have set forth the reasons leading to this conclusion.[41] It may be added that such a result would avoid altogether the undesirable features of factual determination in each case; would prevent the multiple and, in effect, discriminatory burden which would follow from allowing both states to tax until Congress should intervene; and would reduce by

[41] "If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or

half, at least, the tax refuge created by the *Adams* ruling, without incurring other outlawed effects.

It is true this view logically would deny the state of origin power to tax, notwithstanding its adequate due process connections, except by giving credit for taxes due at the destination.[42] But the forwarding state has no greater power under the *Adams* ruling and none at all under the present one if it is to be applied consistently and, as I think, this can be taken to outlaw both unapportioned and apportioned taxes.

I have no doubt that under the law prevailing until now this tax would have been sustained, if apportioned, under the *Adams* decision and others.[43] Nor have I any question that such a tax laid by New York would be upheld under those decisions. Indeed, in my opinion, the necessary effect of *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, as appellee asserts, is to sustain power in the state of the market to tax "to the fullest extent" without apportionment by nondiscriminatory taxes of general applicability, transactions essentially no different from the ones involved in this case and in the *Adams* case.

It is true the *Berwind-White* case purported to distinguish the *Adams* case. But it did so by pointing out that the *New York* tax was "conditioned upon a local

for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin. The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character."

[42] Credit allowed for taxes paid elsewhere, see *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, is a form of apportionment, though not the only one.

[43] See also *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434.

incident, delivery of the goods within the State upon their purchase for consumption" and that "the effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have been repeatedly sustained as involving no prohibited regulation of interstate commerce." 309 U. S. 33, 58.

This comes down to sustaining the tax, as was done in *American Mfg. Co.* v. *St. Louis*, *supra*, relied to distinguish the *Adams* case, simply because the tax was pegged upon the "local incident" of delivery. Apart from the reasons I have set forth above for regarding this as not being controlling, that basis was flatly repudiated in *Nippert* v. *Richmond*, 327 U. S. 416, as adequate for sustaining a tax having otherwise the forbidden effects and features. So here, in my opinion, it is hardly adequate to distinguish the *Adams* case, leaving it unimpaired, or to differentiate consistently the broader ruling made in this case.

I therefore agree with the appellee that the effect of the *Berwind-White* ruling was in substance, though not in words, to qualify the *Adams* decision, and that the combined effect of the two cases, taken together, was to permit the state of the market to tax the interstate transaction, but to deny this power to the forwarding state, unless by credit or otherwise it should make provision for apportionment. See Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909, 939. Whether or not such a provision would save the Indiana tax as now applied, in view of what I think was the effect of *Berwind-White* on any basis other than sheer formalism, need not now be considered.[43]

[43] It is obvious that an apportioned tax laid by the forwarding state, taken in conjunction with an unapportioned one levied by the state of

Whether or not acknowledgment of this effect of the *Berwind-White* decision would require reconsideration of the validity of apportioned taxes otherwise than by full credit, laid by the forwarding state,[45] neither that fact nor the effect of *Berwind-White* in qualifying the *Adams* ruling justifies the broader ruling now made to reach the same result as the *Adams* case reached. The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the commerce clause. The present decision, by its reversion to the formal and discarded grounding in the "direct incidence" of the tax is a reversal of that trend. It is one, moreover, unnecessary for sustaining the result the Court has reached. Its consequence, if followed in logical application to apportioned taxes, will be to outlaw them, for they bear as "directly" on "the commerce itself" as does the tax now outlawed in its present application. So also does the type of tax sustained in the *Berwind-White* case, in everything but verbalism.

I think the result now reached is justified, as necessary to prevent the cumulative and therefore discriminatory tax burden which would rest on or seriously threaten interstate commerce if more than one state is allowed to impose the tax, as does Indiana, upon the gross receipts from the sale without apportionment or credit for taxes validly imposed elsewhere. This result would follow in view of

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the market, would produce the effect of multiple state levies, to the extent of the apportioned tax unless the apportionment were made by giving full credit for the other tax. In the latter event, of course, there would be no effect of multiple burden in the sense forbidden by the rule requiring apportionment and sustaining properly apportioned taxes. In the absence of a credit to the full amount of the marketing state's tax, the apportioned tax of the forwarding state, although making a cumulative burden, would impose only a reduced one as compared with an unapportioned tax by that state.

[45] Cf. note 44.

the *Berwind-White* decision and others like it,[46] if not only the state of the market but also the forwarding state could tax the sale "to the fullest extent" upon the gross receipts from it. For this reason I concur in the result.

But in doing so I dissent from grounding the decision upon a foundation which not only will outlaw properly apportioned taxes, thus going beyond the *Adams* decision, unless the Court is merely to reiterate the rule forbidding "direct" taxation of interstate sales only to recall it when a case involving a properly apportioned tax shall arise; but also will require outlawing many other types of tax heretofore sustained, unless a similar retreat is made.

[46] See the "use tax" cases: *General Trading Co.* v. *Tax Commission*, 322 U. S. 335; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. See also *Jagels* v. *Taylor*, 309 U. S. 619, discussed in *McNamara*, *supra*, note 25, at 487.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1946.

Almira G. Freeman, as Successor, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Appellant. *v.* Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.	Appeal from the Supreme Court of the State of Indiana.

[December 16, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Murphy concurs, dissenting.

I think the Court confuses a gross receipts tax on the Indiana broker with a gross receipts tax on his Indiana customer. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, would hold invalid a gross receipts tax, unapportioned, on the broker. In that case, the taxpayer was a marketing agent for fruit growers in the State of Washington. The agent made sales and deliveries of the fruit in other States and in foreign countries, collected the sales prices, and remitted the proceeds, less charges, to the customers. The Court held that the gross receipts tax, being unapportioned, was invalid. There are two reasons why that result followed. In the first place, as the Court stated at p. 437, "the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise" in interstate or foreign commerce. "Such services are within the protection of the commerce clause". In the second place, as the Court stated at p. 439, "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which con-

tribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

Under that view a tax on the commissions of the Indiana broker would be invalid. But I see no more reason for giving the customer immunity than I would for giving immunity to the fruit growers who sold their fruit through the broker in *Gwin, White & Prince Inc.* v. *Henneford*, *supra*.

Concededly almost any local activity could, if integrated with earlier or subsequent transactions, be treated as parts of an interstate whole. In that view *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, would find survival difficult. For in that case a state tax on a manufacturer was upheld though the tax was measured by the value of the goods manufactured within the State and thereafter sold in interstate commerce. In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, a tax laid on the gross receipts of a trade journal published in New Mexico was sustained although out-of-state advertisements were included in the journal and there was interstate distribution of it. The Court treated the local business as separate and distinct from the transportation and intercourse which are interstate commerce and which were employed to conduct the business.

I think the least that can be said is that the local transactions or activities of this taxpayer can be as easily untangled from the interstate activities of his broker.

Any receipt of income in Indiana from out-of-state sources involves, of course, the use of interstate agencies of communication. That alone, however, is no barrier to its taxation by Indiana. *Western Live Stock* v. *Bureau of Revenue*, *supra*. Cf. *New York ex rel Cohn* v. *Graves*, 300

U. S. 308. The receipt of income in Indiana, like the delivery of property there, *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, is a local transaction which constitutionally can be made a taxable event. For a local activity which is separate and distinct from interstate commerce may be taxed though interstate activity is induced or occasioned by it. *Western Live Stock* v. *Bureau of Revenue*, *supra*, p. 253. The management of an investment portfolio with income from out-of-state sources is as much a local activity as the manufacture of goods destined for interstate commerce. *American Mfg. Co. v. St. Louis*, *supra*, the publication of a trade journal with interstate revenues, *Western Live Stock* v. *Bureau of Revenue*, *supra*, or the growing of fruit for interstate markets, *Gwin, White & Prince Inc.* v. *Henneford*, *supra*. All such taxes affect in some measure interstate commerce or increase the cost of doing it. But, as we pointed out in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48, that is no constitutional obstacle.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307, is different. In that case the taxpayer had its factory and place of business in Indiana and sold its products in other States on orders taken subject to approval at the home office. The Court thought the risk of multiple taxation was real, because of the interstate reach of the taxpayer's business activities. The fact is that the incidence of that tax was comparable to the incidence of an unapportioned tax on interstate freight revenues.

The present tax is not aimed at interstate commerce and does not discriminate against it. It is not imposed as a levy for the privilege of doing it. It is not a tax on interstate transportation or communication. It is not an exaction on property in its interstate journey. It is not a tax on interstate selling. The tax is on the proceeds of the sales less the brokerage commissions and therefore does not reach the revenues from the only interstate activities

involved in these transactions. It is therefore essentially no different, so far as the Commerce Clause is concerned, from a tax by Indiana on the proceeds of the sale of a farm or other property in New York where the mails are used to authorize it, to transmit the deed, and to receive the proceeds.

I would adhere to the philosophy of our recent cases[1] and affirm the judgment below.

[1] Of which *Gwin, White & Prince, Inc.* v. *Henneford, supra*, *Western Live Stock* v. *Bureau of Revenue, supra*, and *Mc-Goldrick* v. *Berwind-White Coal Mining Co., supra*, are illustrative.